Consumer Mortgage Coalition

June 3, 2013

Monica Jackson, Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Re: Docket Number CFPB–2013–0010, RIN 3170–AA37
Proposed Amendments to the 2013 Mortgage Rules Under RESPA and TILA

Dear Ms. Jackson:

The Consumer Mortgage Coalition ("CMC"), a trade association of national mortgage lenders, servicers, and service providers, appreciates this opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB") amendments to mortgage rules proposed in April 2013. This proposal would amend:

- Regulation X servicing provisions regarding preemption;
- The small servicer exemption from certain of the new servicing rules;
- The use of government-sponsored enterprise ("GSE") and federal agency qualified mortgage ("QM") definition;
- The determination of debt and income for purposes of originating QM loans; and
- It would also make technical changes.

We offer below comments on these amendments. We also offer comments on other evolving aspects of the many recent rulemakings, including final, pending, and upcoming rulemakings. There are areas where the industry needs guidance on how to comply with the several regulations. We attach two guidance request documents, one for the servicing regulations, and another for the origination regulations. They discuss issues we have communicated to the CFPB in the past, with some minor revisions. We greatly appreciate the attention the CFPB has given to providing a large amount of necessary guidance. Finally, this letter comments on the implementation process for the several mortgage regulations.

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Proposed Amendments in the Present Rulemaking

The proposed amendments generally clarify the regulations and Appendix Q, which we appreciate.

We find especially helpful the proposed amendments that would revise the QM loan definition under the special agency rule. The special agency rule defines loans that do not have certain risky features, and that are eligible for purchase, guarantee, or insurance by certain federal agencies, as QM loans.

The proposal would clarify the special agency rule by including in the QM definition loans that meet agency written agreements with creditors that permit variation from the agency standards. This is appropriate flexibility, as the agencies need to be able to amend and adapt their standards. Their actual standards should apply.

The proposal would also clarify that the relevant agency standards include only those that relate to ability to repay. This is helpful because many agency standards are unrelated to repayment ability or to consumer protection.

Finally, the proposal would clarify that an agency repurchase request is not dispositive of whether a loan met the agency's underwriting standards. We support this because repurchase requests are not necessarily based on thorough fact-finding and may be disputed. It is frequently easier to comply with the request than to contest it. Moreover, a repurchase request may not be related to repayment ability, and can be made on a loan that has not defaulted. For these reasons, we support treating repurchase requests as not determinative.

Comments on Rulemakings to Date

We take this opportunity to comment on some of the more significant issues that are evolving in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank") mortgage rulemakings.

Positive Aspects of the Final Regulations to Date

The January 2013 final ability-to repay regulation contains a safe harbor from Truth in Lending Act ("TILA") liability for some QM loans. This is an extremely important development because it will permit mortgage lending to continue without unnecessary turmoil, if only to consumers who qualify for QM loans that are not higher-priced covered transactions.

The special agency QM definition is also a positive aspect of the ability-to-repay regulation because the agency share of the market is very predominant.

The May 29, 2013 amendments to the January 2013 ability-to-repay regulation remove employee compensation from the definition of points and fees. This is an important

improvement to the regulation. Defining and determining the amount of employee compensation would have been extremely difficult. Creditors' difficulty in determining the amount of points and fees on a loan would have required them to be over-inclusive when calculating points and fees. Effectively, including undeterminable items in points and fees would have lowered the threshold below three percent, thereby constraining credit more than Congress intended.

Residual Income and TILA Liability

The ability-to-repay regulation gives creditors four basic methods of compliance:

- Make a QM loan that is not a higher-priced covered transaction, which provides a safe harbor from liability under TILA.

- Make a QM loan under the special agency definition.

- Make a QM loan that is higher-priced.
    - (This option does not provide a safe harbor, merely a rebuttable presumption that the creditor complied with the ability-to-repay regulation. Notably, the consumer may rebut this presumption by showing that the loan left the consumer with insufficient "residual income" or assets with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware.)

- Make a non-QM loan
    - (In this case, the creditor must consider, among other things, the consumer's debt-to-income ratio or residual income.)

Both the third and fourth options contain a residual income standard. Neither the regulation nor the commentary defines the term "residual income." Neither defines or identifies: the debt and living expenses that are relevant to residual income, how to quantify them; or the amount of residual income that is sufficient.

The section-by-section analysis to the May 29 amendment to the January 2013 QM regulation states:

> "[T]he Bureau is not persuaded by the arguments that creditors would rather cease extending credit than make a qualified mortgage loan subject to the rebuttable presumption. . . . The Bureau believes that the ability-to-repay requirements and qualified mortgage provisions reflect standard industry underwriting practices, and that creditors that make a reasonable effort to determine a consumer's ability to repay would not be concerned with potential litigation risk that may result from the rebuttable presumption. Thus, based on the feedback provided, the Bureau does not believe that a creditor would incur much, if any, additional cost by extending refinancing credit under the qualified mortgage provisions of § 1026.43(e)(4) as opposed to the exemption under proposed

> § 1026.43(a)(3)(viii). Absent evidence that the special qualified mortgage provisions for GSE-eligible loans impose significant costs on creditors, the Bureau does not believe that consumers are at risk of being denied responsible, affordable mortgage credit."[1]

We provide the following observation. A similar issue arose with the higher-priced mortgage loan ("HPML") regulation finalized in 2008, which became effective October 1, 2009. The Federal Reserve issued this regulation using its authority under the Home Ownership and Equity Protection Act ("HOEPA").[2] The liability that attaches to HOEPA loans also attaches to noncompliance with the ability-to-repay regulation. Many parties, including the CMC, cautioned, in comments during the HPML rulemaking, that HOEPA liability would constrain credit:

> "[V]iolations of the requirements of Section 129 are subject to far greater damages than are violations of other requirements of TILA. Unlike other TILA provisions, a violation of a requirement of Section 129 may be subject to enhanced damages and rescission. . . . Additionally, the costs of such punishments and litigation would drive substantial numbers of lenders from the market, reducing the availability and affordability of mortgage credit and thereby harming consumers."[3]

The Federal Reserve nevertheless issued its HPML rule under its HOEPA authority, explaining:

> "While unwarranted litigation may well increase, the Board believes that several factors will mitigate this cost. In particular, TILA imposes a one-year statute of limitations on affirmative claims, after which only recoupment and set-off are available; HOEPA limits the strict assignee liability of TILA Section 131(d), 15 U.S.C. 1641(d) to HOEPA loans; many defaults may be caused by intervening events such as job loss rather than faulty underwriting; and plaintiffs (or their counsel) may bear a substantial cost to prove a claim of faulty underwriting, which would often require substantial discovery and expert witnesses. Creditors could further contain litigation risk by using the procedures specified in the regulation that earn the creditor a presumption of compliance."[4]

Dodd-Frank increased the statute of limitations to three years, after which recoupment and set-off are still available. Under the ability-to-repay regulation, proving a claim of faulty underwriting – such as insufficient residual income – would be comparatively easy given that a residual income standard for creditors to use to demonstrate compliance has

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[1] May 29, 2013 release, pages 165 – 166.
[2] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, §§ 151–158, 108 Stat. 2160, 2190-2198 (1994) (codified as amended in scattered sections of the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f).
[3] *CMC comment letter* to the Federal Reserve Board in the HPML rulemaking, Docket R-1305, p. 14 (April 8, 2008).
[4] 73 Fed. Reg. 44522, 44546 (July 30, 2008).

not been defined. The credit constraints under the ability-to-repay regulation should therefore be more severe than under the HPML regulation. As many predicted, the share of HPML loans in the marketplace is very minor:

> "The 2011 HMDA data also include information on loan pricing. The 2011 data reflect the second full year of data reported under revised loan pricing rules, which determine whether a loan is classified as 'higher priced.' Lenders now report on loans with annual percentage rates (APRs) that are 1.5 percentage points for first lien loans and 3.5 percentage points for junior lien loans above the average prime offer rates (APORs), estimated using data reported by Freddie Mac in its *Primary Mortgage Market Survey*.
>
> The data on the incidence of higher-priced lending show that a small minority of first lien loans in 2011 have APRs that exceeded the loan price reporting thresholds. The principal exception was for conventional first lien loans used to purchase manufactured homes; for such loans 82 percent exceeded the reporting threshold in 2011. For conventional first lien loans used to purchase site-built properties, about 3.9 percent of the reported loans exceeded the reporting threshold (up from 3.3 percent in 2010). The incidence of higher-priced lending for FHA-insured loans on site-built properties (3.8 percent in 2011) is virtually the same as for conventional loans. The incidence of higher-priced lending for loans backed by VA guarantees is notably smaller than for either conventional or FHA-insured loans; only about 0.4 percent of VA-guaranteed loans were higher priced in 2011."[5]

Less than four percent of the market is a very small segment of the market. If only four percent of the market were in rebuttable presumption loans, Americans' access to housing credit would be greatly constrained. If the share of the market comprised of rebuttable presumption loans is less than four percent, it is hard to imagine a notable non-QM market share.

We continue to urge the CFPB to provide necessary certainty by setting out a well-defined residual income test so that creditors may continue to make mortgage loans other than QM loans that are not higher-priced covered transactions.

Conflict Between Ability to Repay and Disparate Impact Policies

The policy goals of the ability-to-repay regulation are at odds with the Administration's position on disparate impact under the fair lending laws. The industry is in need of guidance on how to comply with both directives.

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[5] *Federal Financial Institutions Examination Council Announces Availability of 2011 Data on Mortgage Lending*, Press Release (September 18, 2012) (footnote omitted).

Servicing Regulations

The final servicing regulations are in need of additional clarity, undoubtedly due to the CFPB's efforts to complete the rulemaking by January 21, 2012. For example, the regulations both require notices to borrowers who become 45 days delinquent, and prohibit servicers from sending default notices until a loan is 121 days delinquent. While servicers understand this was unintended, noncompliance with the prohibition on default notices until day 121 of delinquency subjects servicers to private rights of action.

Another complication is that the regulation requires servicers to send notices of the due date for a complete loss mitigation application, including deadlines the servicer may not know, and due dates that may have passed before the servicer sends the notice. Plainly, this was unintended. We recommend the CFPB take the time it needs to complete its regulations rather than rush to meet an unnecessary deadline. The Dodd-Frank Act does not require this provision or the conflicting default notice provisions.

The Regulation X servicing regulation would permit "back door" discovery through its broad information production requirements. Even privileged or otherwise protected information, or information whose release is governed by discovery procedures in pending litigation, could be subject to production. The Dodd-Frank Act required the CFPB to define the term "valid qualified written request," but did not require or envision anything nearly as broad as the error resolution and information request provisions.

The periodic statement requirement would extend to loans that are subject to bankruptcy or that have been accelerated. These situations are not well served by monthly statements. Especially for bankruptcy cases, a redesign of any periodic statement would be necessary.

From a broader perspective, we appreciate and do not disagree with the CFPB's goal to ensure that consumers receive appropriate mortgage modification options should they default or risk defaulting on their mortgage loans. We note that the Administration, Federal Housing Finance Agency, and the GSEs have extended the current mortgage modification and refinance programs, including the Making Home Affordable ("HAMP" and "HARP") programs, through 2015, so there is time for the CFPB to ensure that the servicing rules are implemented in a manner that will ensure that the industry can both comply with the regulations and achieve the CFPB's broader goals. It would be very unfortunate if the CFPB does not give industry the necessary guidance and clarifications, because the result may be that the industry is not able to fully provide consumers with the mortgage modification options that are currently available.

Implementation Process

The CFPB finalized several regulations in January 2013 as Dodd-Frank required. Also that January, the CFPB finalized regulatory provisions that are not required by Dodd-Frank. The CFPB has set a January 2014 effective date for almost all of the mortgage rules, even though that is not required.

Generally, implementing several regulatory amendments at the same time is less burdensome than implementing them piecemeal. However, that is not possible with the new mortgage regulations. While the CFPB released several final regulations in January 2013, most of the rulemakings were not complete at that time, including the most significant mortgage regulations. One of the final regulations was accompanied by proposed amendments released the same day as the final regulation. Some provisions have been amended after January 2013, some provisions are the subject of a pending rulemaking, and additional amendments have yet to be proposed. The industry is therefore in the process of implementing some, but not all, of the regulations. To reduce the regulatory burden of this piecemeal implementation process, we make the following recommendations.

- Require a one-year implementation period only for the provisions of the regulations required by Title XIV, and permit a more reasonable implementation period for other provisions. Dodd-Frank does not require the HOEPA regulation[6] and does not require most of the servicing regulations, such as the loss mitigation provisions, or the error resolution and information request provisions beyond defining a valid qualified written request.

- Provide additional time to implement the loss mitigation aspects of the servicing regulation. Given that this part of the servicing regulation is in need of additional significant amendments, implementation cannot begin in earnest until revisions to the regulations are substantially complete. After the servicing regulations are final, there should be at least 18 months to implement them.

- Provide additional time to reformat the periodic statements required by one of the servicing regulations. While Dodd-Frank does require periodic statements for most loans, it does not require all the changes in the final servicing regulation. Specifically, the Dodd-Frank Act merely requires periodic statements to contain certain items of information, but servicers in almost all cases already provide all that information and more. The final regulation exceeds Dodd-Frank by requiring servicers to rearrange the layout of the information. The CFPB to our knowledge has not identified problems with the layout of existing statements, and we therefore see no reason to require rearranged statements on a hurried schedule.

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[6] As the CFPB stated in its proposed high-cost mortgage rule:

> "Under section 1400(c)(1) of the Dodd-Frank Act, regulations that are *required to be issued* to implement amendments under Title XIV by the Dodd-Frank Act take effect not later than one year from the date of the issuance of the final implementing regulations. The regulations proposed in this notice, while implementing amendments under Title XIV of the Dodd-Frank Act, are *not* regulations required to be issued by the Act. Therefore, the Dodd-Frank Act does not require the final regulation to be effective within one year from issuance of that final regulation."

77 Fed. Reg. 49090, 49096 (August 15, 2012).

- We anticipate proposed amendments to the January 2013 servicing regulations in June 2013. We recommend that the CFPB provide a 60-day comment period because the issues involved are both new and complex. Without sufficient comments, drafting errors are more likely. It would be better, and faster, to obtain needed comments and amend the rules only once.

- After the servicing regulations are amended, servicers should have a reasonable time to implement the revisions. A January 2014 implementation date for regulations that will be proposed in June 2013 is unrealistic.

Conclusion

We appreciate the CFPB's ongoing efforts to carefully redesign almost the entire federal consumer protection apparatus for mortgage lending and servicing. This is not a matter well suited to being rushed into place as fast as possible at the sacrifice of quality. We urge the CFPB to take the amount of time it reasonably needs to craft the servicing regulations. Again, we would like to stress that we agree with the CFPB's broader goals, but we urge the CFPB not to unnecessarily cause turmoil or constrain credit. We would be pleased to continue our discussions on the many implementation issues.

Thank you for your consideration of our comments in this letter and in the requests for guidance in the two attached documents.

Sincerely,

Anne C. Canfield
Executive Director

Attachments
- Joint Servicing Guidance Requests. (Item 73 is new.)
- CMC Origination Guidance Requests. (Items related to including employee compensation in points and fees are removed.)

AMERICAN FINANCIAL SERVICES ASSOCIATION
CONSUMER MORTGAGE COALITION
MORTGAGE BANKERS ASSOCIATION

GUIDANCE REQUESTS for SERVICING REGULATIONS to the BUREAU OF CONSUMER FINANCIAL PROTECTION

Working Document
June 3, 2013

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GENERAL MATTERS

TOPIC	ISSUE	RECOMMENDATION
1. Effective Dates	The Dodd-Frank Act requires a January 2014 effective date for required rules, but some aspects of the final servicing rules exceed the required rules. Mortgage servicers and lenders are currently implementing an enormous volume of new, and very comprehensive, set of regulatory amendments. More are yet to come. The industry must acknowledge the possibility that compliance by the January 2014 dates may not be possible.	We recommend that the CFPB discuss with industry member and representatives how to manage the implementation dates.
2. Small Servicer Definition, § 1026.41(e)(4)(ii)	The Regulation Z small servicer definition, at § 1026.41(e)(4)(ii), is incorporated into Regulation X by §§ 1024.17(k)(5)(iii) and 1024.30(b)(1). The definition provides: "(ii) *Small servicer defined.* A small servicer is a servicer that either: (A) Services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; or (B) Is a Housing Finance Agency, as defined in 24 CFR 266.5." For this purpose, does the word "assignee" refer to an assignee of the loan, the servicing, or either? If it refers only to the loan, the definition would be extremely narrow.	We request clarification of the term assignee in § 1026.41(e)(4)(ii). We also request clarification of the definition in the case of a small servicer that acquires servicing in a merger or acquisition of the creditor or assignee.
3. Definition of Business Day	The definition of business day is not the same in Regulation X and Z. The revised Regulation X frequently uses the term "days (excluding legal public holidays, Saturdays, and Sundays)." Regulation Z defines two types of business days, general and specific:	We request clarification that, under Regulation X, servicers can elect to treat Patriots' Day as a legal public holiday.

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	"Business day means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ 1026.15 and 1026.23, and for purposes of §§ 1026.19(a)(1)(ii), 1026.19(a)(2), 1026.31, and 1026.46(d)(4), the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day." Section 1026.2. Maine and Massachusetts, but not other states, observe Patriots' Day on the third Monday in April, when federal and state offices as well as many businesses are closed.	
4. Mailing as Delivery, § 1024.11	The new rule did not amend § 1024.11, which provides: "The provisions of this part requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address." This does not mention servicers, yet servicers need to deliver disclosures to borrowers. The lack of mention of servicers, by negative	We suggest that § 11 be revised to read: "The provisions of this part requiring or permitting mailing of documents shall be deemed to be satisfied ~~by placing the~~ **when the** document **is placed** in the mail **or with a private delivery service** (whether or not received by the addressee) addressed to the addresse~~s~~ **obtained by the lender, settlement agent, servicer, or other party making the disclosure, as the appropriate delivery address. If the lender, settlement agent, servicer, or other party making the disclosure, receives notice of a change in that address, it must begin using the new address within a reasonable amount of time, which shall not be less than five specific business days.** ~~stated in the loan application or in other information submitted to or obtained by the lender at the time of loan application~~

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	implication, could be read to mean that servicers who mail disclosures have not delivered them until they are received, which is not the intent and would be unworkable because it is difficult to track when mail arrives or is received. The appropriate delivery address may not be the address "submitted to or obtained by the lender" and may not be a revised address of which "the lender or settlement agent has been expressly informed[.]" A servicer may be notified of a change of address, then later transfer the servicing to a new servicer. The new servicer will have the correct address but may not have received notice of a *change* of address. The regulation in some places provides that a servicer delivers a disclosure by putting it in the mail. *See* §§ 7(a)(2) and (b)(2); § 37(c)(1)(i); 37(d)(1); 37(e)(1)(i); 37(e)(5). However, in some places the rule is silent about whether a servicer has delivered a disclosure by mailing it. *See* § 34(b); 37(g)(2); and §§ 35 and 36.	~~or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address."~~ Similar language in Regulation Z would be helpful.
5. UDAAPs		Compliance with Regulation X, Regulation Z, and their commentaries should in no circumstances be an unfair and deceptive act or practice ("UDAP") under state or federal law or a UDAAP under Dodd-Frank §§ 1031(a) or 1036(a)(1)(B).
6. Presumed Consent to Electronic Statements, Regulation Z Comment 41(c)-4	Regulation Z's comment 41(c)-4 provides: "Any consumer who is currently receiving disclosures for any account (for example, a mortgage or checking account) electronically from their servicer shall be deemed to have consented to receiving e-statements in place of paper statements."	This is helpful. We recommend applying this deemed consent to all disclosures under Regulations X and Z.

SERVICING – REGULATION X

TOPIC	ISSUE	RECOMMENDATION
Escrow Accounts, § 17		
7. Advancing premiums, § 17(k)(5)	Section 17(k)(5) provides: "(i) *In general.* Except as provided in paragraph (k)(5)(iii) of this section, with respect to a borrower whose mortgage payment is more than 30 days overdue, but who has established an escrow account for the payment for hazard insurance, as defined in § 1024.31, a servicer may not purchase force-placed insurance, as that term is defined in § 1024.37(a), unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner. (ii) *Inability to disburse funds.* (A) *When inability exists.* A servicer is considered unable to disburse funds from a borrower's escrow account to ensure that the borrower's hazard insurance premiums are paid in a timely manner only if the servicer has a reasonable basis to believe either that the borrower's hazard insurance has been canceled (or was not renewed) for reasons other than nonpayment of premium charges or that the borrower's property is vacant." The definition of hazard insurance includes both flood and non-flood hazard insurance. Section 31. Suppose a servicer escrows for flood, but not any other hazard insurance, the loan is more than 30 days overdue, and the non-flood insurance premium is due. Must the servicer use the funds escrowed for	We request clarification that because the servicer is not authorized to pay the non-flood bills and the non-flood hazard insurance is not escrowed, the servicer should not use the flood insurance escrows for non-flood/non-escrowed items. We request clarification that if a servicer escrows for insurance that the servicer does not require, no advances are required for that nonrequired insurance. If there is ultimately a foreclosure and there are insufficient funds to reimburse the servicing advances as well as pay the accrued interest and principal balance, the investor will likely disallow the advanced premiums. It seems reasonable that when the borrower becomes delinquent, if any of the escrowed coverage is extra or the servicer can force place coverage for an amount less than the escrowed amount but still provide the minimum investor-required coverage, the servicer should not be obligated to continue to advance for the borrower's optional excess coverage.

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	flood insurance premiums to pay for a different insurance policy? A borrower may request an escrow for insurance on the property that the servicer does not require.	
Scope, § 30		
8. Qualified lender, § 30(b)(3)	Section 30(b)(3) excludes from the scope of Subpart C: "A servicer with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000." 12 C.F.R. § 617.7000 provides: "*Qualified lender* means: (1) A System institution, except a bank for cooperatives, that makes loans as defined in this section; and (2) Each bank, institution, corporation, company, credit union, and association described in section 1.7(b)(1)(B) of the Act (commonly referred to as an other financing institution), but only with respect to loans discounted or pledged under section 1.7(b)(1)."	We request clarification that this refers to servicers that are qualified lenders subject to Farm Credit Administration regulations. We request clarification whether the exclusion, for other financing institutions, applies only to loans that are loans "discounted or pledged" under § 1.7(b)(1).
Definitions, § 31		
9. Exceptions to the definition of loss mitigation option, § 31	Section 31 defines loss mitigation option as: "[A]n alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower." The second comment numbered 31-1 explains:	These types of workouts do not require a full review of the borrower's financial condition, so the § 41 protections, with a 30-day review period, are not necessary. These workouts may begin or be complete before day 36 of a delinquency, so the § 39 early intervention requirements should not apply. They also may be complete before day 45 of a delinquency so that the § 40 continuity of contact procedures should not apply. Servicers should have full flexibility to arrange payment plans with borrowers, rapidly when a full financial review is

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	“Loss mitigation options include temporary and long-term relief, including options that allow borrowers who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a locality, a State, or the Federal government.”
	
	This definition appears all-inclusive. Section 41 applies a number of procedural requirements for loss mitigation actions, and subjects servicers to private rights of action for alleged noncompliance. It is important that the definition of loss mitigation not be overbroad so that servicers will have flexibility to work with borrowers without having to take into account the cost of litigation risk for offering loss mitigation options.
	
	There are a number of workouts servicers routinely offer that do not rise to the level of needing formal § 41 procedures. Examples include:
	1. A borrower refinances, such as at a lower rate, lower UPB, or for a longer term, with the current servicer or its affiliate.
	2. On a current loan, a servicer unilaterally lowers the interest rate or converts an ARM loan to a fixed rate loan to prevent a potential default. The servicer has no need to review the borrower’s financial condition.
	3. A borrower without an escrow fails to pay property taxes, so the servicer pays the taxes and permits the borrower to repay the taxes over time because the borrower claims inability to pay the taxes in a lump sum. The servicer does not necessarily review the borrower’s
		unnecessary. These loan workouts do not need to go through the waterfall process because they are simple agreements, although § 41(c)(1)(i) would require considering the borrower for “all loss mitigation options available[.]”
		
		We recommend that the definition of loss mitigation option be revised to exempt the following:
		
		• Loan originations, whether or not related to resolving or preventing a default.
		• An adjustment that fixes or lowers the interest rate, or both, for the life of the loan, without extending the loan term or capitalizing any arrearages, at no charge to the borrower.
		• An agreement by which the borrower may pay the servicer for any mortgage-related obligations, as defined in § 1026.43(b)(8) [in the ATR rule, including taxes, insurance, condo and similar fees; ground rents; and leasehold payments] after they are or were due.
		• An agreement that permits the borrower to pay any portion of the loan payments at a date later than originally scheduled.
		  o *See*, for example, the Fannie Mae Guide, § 403, covering a number of borrower-specific situations in which “the servicer can agree to reduce or suspend the borrower’s monthly payments for a specified period. Forbearance may be offered by itself or in combination with other foreclosure prevention alternatives, such as a combination of forbearance and a repayment plan.” Forbearance plans are typically for six months, with longer plans requiring Fannie Mae approval. Servicers may be required to consider forbearance options, § 403.02.02.
		  o *See also* the Fannie Mae Guide § 404, covering repayment

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	financial condition because the increase in periodic payments is relatively small and the borrower wants to remain in the home. 4. A borrower who has missed, or is about to miss, one payment or a few payments because of a unique event works out an arrangement with the servicer. The agreement may involve repayment over time, either currently or in the future, depending on the borrower's specific situation. The servicer does not review the borrower's financial condition as it would with a formal modification. Such agreements are often reached over the phone. Flexibility is critical to the success of these workouts because every situation is different.	plans, which are typically 12 to 18 months. Servicers may be required to consider repayment plans for temporary hardships. § 404. o Forbearance and repayment plans are less formal than modifications, typically require less documentation, and may be oral. The flexibility they offer can prevent unnecessary foreclosures. We also recommend that the definition of delinquency, for periodic statement purposes, in § 1026.41(d)(8), be limited to delinquencies that are not subject to an agreement with the servicer to resolve, repay, or otherwise work out the delinquency. In examples 3 and 4, the loan is technically delinquent although the servicer does not follow normal collection procedures. As long as the borrower continues to make payments as agreed with the servicer, there should be no need include delinquency information related to the workout in the periodic statement under § 1026.41(d)(8) because it will be covered by the agreement with the borrower. In addition, the § 1026.41(d)(8) information is not designed for examples 3 and 4. It requires disclosure of: • The date the consumer became delinquent. In examples 3 and 4, this will not matter to the borrower because the servicer has agreed not to pursue the delinquency. • Risks if the delinquency is not cured. In examples 3 and 4, this is not relevant because the servicer has agreed not to pursue the delinquency. • An account history showing the amount due from each billing cycle. Again, this is not relevant. The consumer needs to know how much

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		to pay in the future, not which billing cycle it was "due." The amount to pay is set out in the agreement with the servicer. When the payment is "due" has changed, so the periodic statement would be misleading.
10. Definition of loss mitigation application, and time for verifying whether an agent is authorized to act for borrower, comment 31-1	Comment 31-1 provides that a loss mitigation application may be submitted by a borrower's agent, and that the servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf.	Servicers have duties based on the date they receive a loss mitigation application. When an agent is involved, servicers should not be deemed to have received an application until they have had a reasonable amount of time to verify any agent's authority. The permitted time should not run while the servicer is waiting for a response to questions related to, or for documentation about, the agent's authority. This recommendation is the same treatment in comments 35(a)-1 and 36(a)-1, relating to the time to respond to error assertions and information requests. Those comments permit servicers to treat the error assertion or information request as received "[u]pon receipt of such documentation" from the borrower that the agent has authority to act on the borrower's behalf. It is also similar to Regulation Z comment 36(c)(3)-1, which permits creditors to verify the authority of an agent who requests a payoff statement before the time for delivering a payoff statement begins to run.
Servicing Transfers, § 33		
	See also § 38(b)(4), which covers servicing transfers.	
11. Appropriate mailing address, comment 33(b)(3)-1	Comment 33(b)(3)-1 provides: "A servicer mailing the notice of transfer must deliver it to the mailing address (or addresses) listed by the borrower in the loan documents, unless the borrower has notified the servicer of a new address (or addresses) pursuant to the servicer's requirements for	We recommend revising the language as follows: "A servicer mailing the notice of transfer must deliver it to the mailing address (or addresses) listed by the borrower in the loan documents, unless the borrower has notified the servicer**, lender, or a prior servicer** of a new address (or addresses) pursuant to the

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	receiving a notice of a change of address." It is possible that a prior servicer, rather than a borrower, provided the change-of-address notice to the servicer who is mailing a notice, or that the borrower provided the change-of-address to a lender.	servicer's**, lender's, or prior servicer's** requirements for receiving a notice of a change of address."
12. Payments incorrectly sent to transferor, § 33(c)(1)	For 60 days after the transfer effective date, timely payments sent to the transferor "may not be treated as late for any purpose." § 33(c)(1). The transferor must either send the payment to the transferee or return it to the borrower with notice of the proper recipient. § 33(c)(2). The requirement that the transferee treat the payment as timely assumes that the transferee is aware of the payment, but this will often not be the case, at least for a few days after the transferor mails the payment. Comments 33(c)(1)-2 and 39(a)-1.iii both seem to acknowledge this. Borrowers who receive the returned payment, even with clear instructions on where to send it, may not forward the payment immediately, especially if they are under financial strain. Or, the borrower may be away from home and not realize the payment was misdirected, and would not know at least to call the servicer. Comment 33(c)(1)-2 provides that a transferee's "compliance" with § 39 (early intervention) during the 60-day period does not constitute treating a payment as late for purposes of § 33(c)(1).	To the extent the transferee has no reason to know a payment was timely sent to the transferor, has not received it, and acts as if the payment was not received, the transferee should not be held in violation of any law, policies or procedure under § 38, or any UDAP or UDAAP law. A transferee should be required to treat only one misdirected payment from the same borrower as timely. There is no need to notify borrowers repeatedly of the same information. One misdirected payment may be an error, but the second one likely is not. The borrower may assume that the transferor will not cash the check, meaning mailing a check that would bounce is a method to avoid payment. The requirement that the transferee treat a payment as timely even when the servicer has not received it should never apply to any of the servicer's duties to investors, it should only apply to the servicer's duties with regard to the borrower. We recommend a comment making this clear. Comment 33(c)(1)-2 talks of compliance with § 39 with respect to timely payments. Section 39 does not apply in the absence of a delinquency, and the concept of compliance with the inapplicable is confusing. It would be clearer to replace "compliance" with "actions based on § 1024.39[.]"

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13. Preemption, § 33(d)	Section 33(d) preempts state laws that require servicing transfer notices.	It should also expressly preempt any federal or state UDAP laws, and UDAAP laws under Dodd-Frank §§ 1031(a) or 1036(a)(1)(B).
Escrow Refunds, § 34		
14. Payment of a loan in full, § 34(b)	Section 34(b) requires escrow refunds after "payment of a mortgage loan in full[.]" After a short sale, deed-in-lieu, or sale-leaseback, whether the loan is paid "in full" may not be clear, especially in states that do not permit deficiency judgments.	When a servicer, assignee, or both agree with a borrower or borrowers on a short sale, deed-in-lieu of foreclosure, sale-leaseback, or similar nonretention foreclosure alternative, whether any escrow refund is required should be determined by that agreement.
Error Assertions, § 35		
15. Annual escrow statements available on demand at any time, comment 35(a)-2	Comment 35(a)-2 provides: "A servicer should not rely solely on the borrower's description of a submission to determine whether the submission constitutes a notice of error under § 1024.35(a), an information request under § 1024.36(a), or both. For example, a borrower may submit a letter that claims to be a 'Notice of Error' that indicates that the borrower wants to receive the information set forth in an annual escrow account statement and asserts an error for the servicer's failure to provide the borrower an annual escrow statement. Such a letter may constitute an information request under § 1024.36(a) that triggers an obligation by the servicer to provide an annual escrow statement." The obligation to provide annual escrow statements is triggered by RESPA § 10(c)(2)(B) and by § 1024.17(i). The comment quoted seems to imply that a borrower can send in a request for an annual escrow statement, that is not an error assertion, and that the information request "triggers" an obligation to send an annual escrow statement. This seems to imply that borrowers have the right to receive annual escrow statements monthly.	We request clarification that an information request that does not assert an erroneous annual escrow statement does not trigger a requirement to send a new annual escrow statement.

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16. Reasonable fees for nonpayment default, comment 35(b)(2)-2.iii	Comment 35(b)(2)-2.iii gives examples of fees for which a servicer lacks a reasonable basis to charge, including: “A default property management fee for borrowers that are not in a delinquency status that would justify the charge[.]” Some mortgage defaults are unrelated to late payments. Borrowers are required, for example, to maintain the property and are often required to repair it if it is damaged. Failure to do so as required is a default even if all payments are timely. For example, the GSE Uniform Security Instrument provides: “Lender may charge Borrower fees for services performed in connection with Borrower’s default, for the purpose of protecting Lender’s interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys’ fees, property inspection and valuation fees.”	Servicers may charge borrowers appropriate fees to protect the servicer and investor from nonpayment defaults, even if the loan is current. The quoted comment should be amended to read: “A default property management fee for borrowers that are not in a ~~delinquency~~ **default** status that would justify the charge[.]”
17. Error under § 35(b)(7) should not include failure to provide complete loss mitigation information under § 39(b)(2),	Section 35(b)(7) defines error to include: “Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.” Section 39(b)(2) requires servicers to supply only “brief” loss mitigation information.	We request clarification that if a servicer has provided the information required by § 39(b)(2), *per se* there can be no error under § 35(b)(7). Specifically, the definition of error should not apply when a servicer provides all the information required by § 39(b)(2) even if it is not complete and exhaustive because § 39(b)(2)(iii) requires only a “brief description of examples of loss mitigation options that may be available from the servicer.”
18. An error under § 35(b)(7) should include only duties that require information disclosure	Section 35(b)(7) defines error to include: “Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.”	We request clarification that the § 35(b)(7) definition of error includes only duties under § 39 that require disclosure of information.

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	The referenced § 39 requires actions other than providing information; it requires attempting to contact a borrower.	
19. An error under § 35(b)(8) should not include failure to transfer useless information	Section 35(b)(8) defines error to include: "Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer." Some information relates to "the servicing of a borrower's mortgage loan" that the transferee does not need. For example, the transferee normally does not need all communications between the transferor servicer and the investor for the period before the transferee is the servicer. Likewise, identification of which employee within the transferor servicer prepared a response to a QWR, or responded to a phone inquiry, likewise is not useful to the transferee servicer. There should be no requirement to transfer useless information. If there is a transfer of servicing but no change in the document custodian, not all the information will need to be transferred. In this case, there should be no requirement that the transferor or custodian transfer the custodian's files at all.	If the transferee and transferor servicers agree that particular information does or does not need to be transferred, failure to deliver the unnecessary should never be a violation. This way, the appropriate information will be transferred, but the regulation would not need to specify every conceivable piece of information that must be transferred in every scenario. We recommend revising § 35(b)(8) as follows: "Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account **that the transferor and transferee agree should be transferred** to a transferee servicer."
20. Definition of "any other error," § 35(b)(11)	Section 35(b) defines error to include, in addition a list of errors: "Any other error relating to the servicing of a borrower's mortgage loan."	We request clarification that if the borrower does not specify an error, and the servicer cannot reasonably understand what error the borrower asserts, there is no error assertion.
21. Single intake address, § 35(c)	Section 35(c) permits servicers to designate an address for submissions of error assertions.	We request clarification that it is permissible to designate a single address for submissions of error assertions, information requests, and

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		QWRs.
22. Change of intake address, 35(c)	Section 35(c) requires notice of a change in a designated intake address, but does not specify by when. Comment 38(b)(5)-1 provides that servicers may notify borrowers of the error assertion process by a notice (mailed or delivered electronically) or a website.	We suggest that if the new address is included on or with the last periodic statement delivered before the change becomes effective, that should be sufficient. If a servicer will designate the existing QWR address as the intake address for error assertions, no separate notice should be required when the regulation becomes effective.
23. Providing the designated address, comment 35(c)-2	Comment 35(c)-2 provides: "If a servicer establishes an address that a borrower must use to assert an error, a servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer." This would be very broad, including even oral communications, and even if the borrower expressed an unwillingness to hear the information. It could be required on escrow statements, rate-reset notices, and IRS Forms 1098. It could also be required on initial and annual privacy notices even if the opt-out address is different that the error assertion address, possibly confusing borrowers. It would also require the intake address on force-placed insurance notices, which do not include this information and which prohibit additional information on the form. Sections 37(c)(4); (d)(4); and (e)(4). These provisions permit additional information on a separate piece of paper. However, including an intake address on a separate piece of paper would be wasteful, and would appear to indicate that the intake	We recommend that the address need be provided only: • Upon request; and • In periodic statements or coupon books.

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	address is more important then the insurance information. Clearly the CFPB, therefore, did not intend that **all** communications include this intake address.	
24. Notice of right to request documents, § 35(e)(1)(i)(B)	Section 35(e)(1)(i)(B) requires responses to error assertions to state, among other things, how the borrower can request a copy of documents on which the servicer relied.	The servicer should be able to require such requests to be written so the servicer can be able to accurately determine whether a borrower made such a request.
25. Borrowers may or may not provide relevant information, § 35(e)(2)	An error resolution may require information that a borrower has and the servicer does not. The regulation does not permit the servicer to require the borrower to produce that information before investigating the asserted error, and does not permit the servicer to determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation.	We request clarification that when a borrower does not provide requested, relevant information, and the servicer reasonably investigates the error assertion, the servicer's lack of that information should be a permissible basis to determine that no error occurred. If the servicer conducts a reasonable investigation and determines that the servicer needs information it does not possess, and determines that no error has occurred because the servicer lacks necessary information, that error notice should be deemed resolved. If the borrower thereafter supplies the missing information, that should be a new error notice subject to the full 5-day, 30-day, and 45-day response times. Otherwise, a borrower could wait until day 30 or day 45 to deliver the necessary information and the servicer would not have time for a reasonable investigation.
26. Time limits, § 35(e)(3)	Section 35(e)(3)(i)(B) requires servicers to respond to assertions of (b)(9) and (b)(10) errors by the earlier of 30 days from receipt or the date of the foreclosure sale. Comment 35(e)(3)(i)(B)-1 provides: "If a servicer cannot comply with its obligations pursuant to § 1024.35(e) by the earlier of a foreclosure sale or 30 days after receipt of the notice of error, a servicer may cancel or postpone a	The servicer should be held to a reasonableness standard. If the servicer cannot reasonably cancel or postpone a foreclosure sale, it should not be required to respond to the error assertion before the sale. It should be permissible to respond within 30 days and to take any appropriate remedial steps. Otherwise, borrowers would use this as a means to delay an appropriate

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	foreclosure sale, in which case the servicer would meet the time limit in § 1024.35(e)(3)(i)(B) by complying with the requirements of § 1024.35(e) before the earlier of 30 days after receipt of the notice of error (excluding legal public holidays, Saturdays, and Sundays) or the date of the rescheduled foreclosure sale." The statement that servicers "may" cancel or postpone a foreclosure sale is not necessarily true. They will not be able to do so in all cases.	foreclosure. Borrowers would submit baseless error assertions at the last minute for the purpose of delaying foreclosures.
27. 15-day extension should be available long before a foreclosure sale, § 35(e)(3)	The general response time for error assertions is 30 days, extendable to 45 days upon notice to the borrower. The 15-day extension is not always available. Asserted (b)(9) and (b)(10) errors, which relate to foreclosures, require responses by the earlier of 30 days or the date of foreclosure, § 35(e)(3)(i)(C), without any extension, § 35(e)(3)(ii). If the foreclosure sale is scheduled for more than 45 days in the future, the servicer should be able to extend the response time.	The 15-day statutory extension should be available if the error assertion is received more than 45 days before a scheduled foreclosure sale.
28. Borrower requests for information on which servicer relied – multiple requests, § 35(e)(4)	Section 35(e)(4) requires servicers to provide upon request "copies of documents and information relied upon by the servicer in making its determination that no error occurred[.]" If a servicer provides all documents required to be provided, the request should be closed and responses to further requests for documents relied on should not be required.	After providing requested documents, the servicer should not be required to respond to requests for further documents on which it relied. We request clarification that if the servicer determines an error did occur and corrects it, providing documents relied on is unnecessary.
29. Borrower requests for information on which servicer relied – form should not matter, § 35(e)(4)	Sometimes the information a servicer relies on will be a screen shot of account activity. Servicers' systems are not always designed to provide printouts, and may not be in a form or format that is consumer-friendly. A screen shot of account activity, for example, will use "hieroglyphic" codes and terminology that the servicer understands but that a consumer does not.	There should be no need for costly systems changes to alter the form and not the substance of the information. It should be permissible for servicers to provide information in a form different from the form of the information when the servicer used it, and that conveys the same relevant information. There should not be an elevation of form over substance. For example, if a consumer alleges a payment was applied

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		on the wrong date, the servicer should not be required to send a screen shot, but should be able to send a letter that says, "our records reflect that we received your payment due March 1, 2013 on March 16, 2013. We applied your payment as of March 16, 2013."
30. Attorney work product should not be subject to mandatory disclosure, § 35(e)(4)	Section 35(e)(4) does not require servicers to supply information that is confidential, proprietary, or privileged.	It should be clear that servicers are also not required to divulge information protected by the attorney work-product doctrine, even if that information is not privileged. These terms are not synonymous. *See* Federal Rule of Evidence 502.
31. General descriptions of materials withheld should be sufficient, § 35(e)(4)	Section 35(e)(4) provides: "If a servicer withholds documents relied upon because it has determined that such documents constitute confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing within 15 days[.]"	It should be permissible for servicers to include a general description of materials withheld, to meet the 15-day deadline. It may not be reasonably possible to produce a privilege log that quickly, and one should not be required. A statement such as the following should be permissible: "We are not required to provide you with materials that are confidential, proprietary, privileged, or that are attorney work-product. We do not include any such information."
32. Frivolous or abusive error assertions should not require a response, § 35(g)	The error resolution process is not required when an error notice alleges a duplicative or overbroad error. That could mean it does apply to frivolous or abusive error assertions. For example, habitual late payers could send a baseless, but different, error assertion for each late payment to delay adverse, but accurate, credit reporting.	The error resolution procedure should not apply to frivolous or abusive error assertions.
33. Error assertions that are the subject of pending litigation should not require a response, § 35(g)		We recommend that servicers should not be required to respond to error assertions that are the subject of pending litigation because any response requirement would interfere with the discovery process overseen by neutral courts and the rules of procedure and evidence.
34. Error assertions buried	§ 35(g)(1)(ii) provides:	It is not clear how servicers are to reconcile these two provisions. We

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in abusive error assertions, § 35(g)(1)(ii)	"To the extent a servicer can reasonably identify a valid assertion of an error in a notice of error that is otherwise overbroad, the servicer shall comply with the requirements of paragraphs (d), (e) and (i) of this section with respect to that asserted error." Comment 35(g)(1)(ii)-1.iii appears to contradict the regulation. It provides that an unduly burdensome error assertion includes: "Assertions of errors in a form that is not reasonably understandable or is included with voluminous tangential discussion or requests for information, such that a servicer cannot reasonably identify from the notice of error any error for which § 1024.35 requires a response."	recommend an additional example of an overbroad or unduly burdensome error assertion: "A submission that is unreasonably lengthy in relation to what it appears to assert."
35. Untimely error assertions, § 35(g)(1)(iii)(B)	The regulation does not require responses to error assertions submitted more than a year after the loan balance was paid in full. After a short sale, deed-in-lieu, or sale-leaseback, whether the loan is paid "in full" may not be clear, especially in states that do not permit deficiency judgments.	No response should be required more than a year after a servicer, assignee, or both, execute with a borrower or borrowers a short sale, deed-in-lieu of foreclosure, sale-leaseback, or similar nonretention foreclosure alternative.
36. Notice to borrower that servicer is not required to respond to error assertion, §35(g)(2)	Section 35(g)(2) provides: "If a servicer determines that, pursuant to this paragraph (g), the servicer is not required to comply with the requirements of paragraphs (d), (e) and (i) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such a determination. The notice to the borrower shall set forth the basis under paragraph (g)(1) of this section upon which the servicer has made such determination."	Servicers that receive duplicative, overbroad, untimely, abusive, or frivolous error assertions should not be required to repeatedly send the § 35(g)(2) notice that no response is required. Congress directed the CFPB to put an end to abusive QWRs. RESPA § 6(k)(1)(B). There is no reason servicers should remain required to respond to abusive notices or inquiries. We recommend that a servicer be required to send no more than two § 35(g)(2) notices in response to similar error assertions in connection with the same loan.

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	Borrowers can repeatedly send the servicer the same notice of error over and over again, and the servicer would have to send the non-responsive response each time. This is unduly burdensome on the servicer and offers no consumer benefit.	
37. Limits on adverse credit reporting, § 35(i)	Section 35(i) provides: "After receipt of a notice of error, a servicer may not, for 60 days, furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the notice of error."	To prevent borrower abuse, this prohibition should not apply after a servicer determines that a response is not required. Otherwise, habitual late payers could send a baseless, but different, error assertion for each late payment to delay adverse, but accurate, credit reporting.
Information Requests, § 36		
38. Scope of requests that require responses, § 36(a) and 36(f)(1)(iii)	The § 35 definition of error is limited to servicing-related errors. There is no analogous definition of information request. A QWR that requests information "relating to servicing the mortgage loan" is an information request, but non-QWR information requests do not need to relate to servicing. Section 36(f)(1)(iii) says servicers do not need to respond to requests for information that is not directly related to the borrower's mortgage loan account. However, this is not limited to servicing information. It apparently requires servicers to provide any requested origination information. The CFPB states in its section-by-section analysis: "[T]he Bureau does not believe that the information request procedures should replace or supplant civil litigation document requests and should not be used as a forum for pre-litigation discovery."	Including origination information in the scope of the information request procedures would create a "back-door" discovery process, especially in light of both the ability-to-repay rule and the Administration's approach to disparate impact liability. We agree with the CFPB that discovery should be overseen by an impartial judge who can weigh the importance of the information against the costs of producing it. <u>Ability-to-Repay "Back Door" Discovery</u> Consumers will have an incentive to establish that a purported QM loan was not a QM loan, and will use this servicing rule for pre-litigation fishing expeditions. As this was not the CFPB's intent, we recommend adding additional examples of irrelevant information to comment 36(f)(1)(iii), including: • Information that relates to whether the loan was originated in

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	78 Fed. Reg. 10696, 10761 (Feb. 14, 2013).	compliance with the ability-to-repay rule, 12 C.F.R. § 1026.43; • Information that relates to the whether points and fees on the loan, as defined in 12 C.F.R. § 1026.32(b), exceeded a threshold under the QM definition, the HOEPA definition, a similar definition under state law, or under § 941 of the Dodd-Frank Act (risk retention). <u>Disparate Impact "Back-Door" Discovery</u> Borrowers have a strong incentive to show that a loan was originated, serviced, or treated in the secondary market, with a "disparate impact" on a class, or on classes, of borrowers. Such allegations can lead to large settlements without actual showing of impropriety, thereby providing a strong incentive to use this servicing rule for pre-litigation fishing expeditions. As this was not the CFPB's intent, we suggest additional examples in the same comment, including: • Information that relates to any loan other than the borrower's loan that is serviced by the servicer to whom the information request is made; • Information that relates to any loan application or loan applicant other than the borrower's application and the borrower; • Information that relates to any borrower or loan applicant other than the borrower who made, or on whose behalf was made, the information request; • Information that relates to the practices of the servicer or the originating lender in connection with loans, loan applications, and loan defaults generally, including the borrower's loan and other loans, borrowers, or applicants. <u>Risk Retention is Irrelevant to Consumers</u>

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		Comment 36(f)(1)(ii)-1.i treats as confidential, proprietary or privileged information regarding the servicer's profitability and information provided to investors. Risk retention information does not affect the borrower's obligations, the borrower's loan payments, or any aspects of the borrower's experience with the loan, so servicers should not be required to produce this information outside of actual discovery overseen by an impartial judge. We suggest adding to the examples: "Information that relates to any risk retention or other requirement that may arise in connection with the loan or its securitization, under Dodd-Frank § 941."
39. Single intake address, § 36(b)	Section 36(b) permits servicers to designate an address for submissions of information requests.	We request clarification that it is permissible to designate a single address for submissions of error assertions, information requests, and QWRs.
40. Change of intake address, 36(b)	Section 36(b) requires notice of a change in a designated intake address, but does not specify by when. Comment 38(b)(5)-1 provides that servicers may notify borrowers of the information request process by a notice (mailed or delivered electronically) or a website.	We suggest that if the new address is included on or with the last periodic statement delivered before the change becomes effective, that should be sufficient. If a servicer will designate the existing QWR address as the intake address for information requests, no separate notice should be required when this rule becomes effective.
41. Providing the designated address, comment 36(b)-2	Comment 36(b)-2 provides: "If a servicer establishes an address that a borrower must use to request information, a servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer."	This would be very broad, including even oral communications. We recommend that the address need be provided only: • Upon request; and • In periodic statements or coupon books.

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	This would be overbroad, as discussed under comment 35(c)-2 above.	
42. Format of information provided should be irrelevant, § 36(d)(1)	Section 36(d)(1) requires servicers to provide available requested information. Some requested information will be available in the form of a screen shot of account activity. The systems that produce the screen shots are not always designed to provide printouts, and may not be in a form or format that is consumer-friendly. A screen shot of account activity, for example, will use "hieroglyphic" codes and terminology that the servicer understands but that a consumer does not.	There should be no need for costly systems changes to alter the form and not the substance of the information. It should be permissible for servicers to provide information in a form different from the form in which the servicer stores the information, and that conveys the same relevant information. There should not be an elevation of form over substance. For example, if a consumer asks when a payment was applied, the servicer should not be required to send a screen shot, but should be able to send a letter that says, "our records reflect that we received your payment due March 1, 2013 on March 16, 2013. We applied your payment as of March 16, 2013."
43. Reasonableness standard of information availability does not consider all relevant information; additional examples needed, comment 36(d)(1)(ii)	Comment 36(d)(1)(ii) provides examples of when information is or is not available, using the terms "ordinary course of business," "extraordinary efforts," and "reasonable efforts." These are subjective standards, so it is not clear what compliance requires. For example, comment 36(d)(1)(ii)-2.iii gives an example of information being available "through reasonable efforts in the ordinary course of business" when the servicer has a legal right to access the information and the actual ability to find it. This does not consider the cost of traveling to the facility and making the search. The examples seem to consider whether it is physically possible to retrieve the information before the deadline, which is appropriate. However, none of the examples considers the cost to the servicer, and none weigh that cost against the usefulness of the information to the borrower for an appropriate purpose.	A reasonableness standard should apply to § 36(d)(1) as well as to § 36(f)(1)(iv). A reasonableness standard needs to weigh both: • The servicer's actual costs, in both time and money; • The usefulness of the information to the borrower in understanding the terms of the loan and security instrument, or in performing on the loan. A reasonableness standard should not take into account the usefulness of the information to the borrower for "back-door" discovery or other inappropriate purposes. We urge additional, much more specific, examples, such as: • If a servicer stores requested information offsite, or in a form that is likely not accessible to the borrower, then whether the information is available depends on whether the servicer can retrieve the information, in a format likely accessible to the borrower, within the

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	Section 36(f)(1)(iv) does not require a response to information requests that are unduly burdensome, using a reasonableness standard: “An information request is unduly burdensome if a diligent servicer could not respond to the information request without either exceeding the maximum time limit permitted by paragraph (d)(2) of this section or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances.”	time limits in § 36(d)(2), at a cost that is reasonable, in relation to the apparent usefulness of the information to the borrower’s understanding of the terms of the loan and security instrument or the borrower’s performance on the loan. • If a servicer stores requested information offsite, and in the ordinary course of business goes to the off-site storage facility once per calendar month, the information is available only if the servicer can obtain the information in a regular trip to the offsite facility in time to retrieve the information and deliver it in accordance with § 36(d) within the time limit in § 36(d)(2). • If a servicer stores requested information in a location where there was an accident, disaster, power failure, snowstorm, or similar event that makes delivering the information within the § 36(d)(2) deadline unreasonably difficult, the information is unavailable.
44. Format of information provided, comments 36(d)(1)(ii)-2.i and 36(f)(1)(iv)-1.iii	Comment 36(d)(1)(ii)-2.i provides that information is available when: “The servicer’s personnel have access in the ordinary course of business to audio recording files with organized recordings or transcripts of borrower telephone calls and can identify the communication referred to by the borrower through reasonable business efforts.” Comment 36(f)(1)(iv)-1.iii provides that information need not be delivered: “[I]n specific formats, such as in a transcript, letter form in a columnar format, or spreadsheet, when such information is not ordinarily stored in such format[.]”	If a servicer has available a recording of a relevant call but not a transcript of it, the servicer is not required to transcribe the call to comply with the information request requirements. If the format of the recording is not compatible with consumer devices, must the servicer deliver something the consumer cannot use?

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45. Frivolous or abusive information requests should not require a response, § 36(f)(1)	Section 36(f)(1) provides that servicers are not required to respond to information requests that are duplicative, overbroad, or unduly burdensome. This could mean a response is required to frivolous or abusive information requests. Comment 36(f)(1)(iv)-1 provides examples of overbroad or unduly burdensome requests that are similar to abusive QWRs under current law. This is appropriate. However, we are concerned that when those abusive requests no longer require responses, the abusive requests will change form just enough to fall outside the examples in this comment. For example, instead of sending one overbroad request, new requests may take the form of a large number of narrow, but not overlapping, requests. This would defeat the purpose of preventing abusive requests.	Frivolous or abusive requests should not require a response. Examples in a regulation or commentary would be helpful. We suggest the following examples: • Apparent back-door discovery requests, even if not, individually, overbroad or unduly burdensome. For this purpose, multiple information requests regarding the same loan may be considered together even if submitted separately or at different times. • Requests about underwriting standards that the loan originator used or did not use. • Requests for information about how a lender, settlement agent, or mortgage broker set or sets loan terms or loan charges. • Requests for information about how a servicer set or sets its servicing or default charges. • Requests for information about how a service provider set or sets its charges. • Requests about any risk retention requirements that may be applicable to the loan. • Requests about a different loan, even if the servicer is the same servicer.
46. Requests for information that are the subject of pending litigation should not require a response, § 36(f)		We recommend that servicers should not be required to respond to requests for information that are the subject of pending litigation because any response requirement would interfere with the discovery process overseen by neutral courts and the rules of procedure and evidence.
47. Attorney work product should not be subject to mandatory disclosure,	Section 36(f)(1)(ii) does not require servicers to supply information that is confidential, proprietary, or privileged.	It should be clear that servicers are also not required to divulge information protected by the attorney work-product doctrine, even if that information is not privileged. These terms are not synonymous.

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§ 36(f)(1)(ii)		*See* Federal Rule of Evidence 502.
48. Information requests buried in abusive information requests, § 36(f)(1)(iv)	Section 36(f)(1)(iv) provides: "To the extent a servicer can reasonably identify a valid information request in a submission that is otherwise overbroad or unduly burdensome, the servicer shall comply with the requirements of paragraphs (c) and (d) of this section with respect to that requested information." Comment 36(f)(1)(iv)-1.ii appears to contradict the regulation. It provides that an unduly burdensome request includes: "Requests for information that are not reasonably understandable or are included with voluminous tangential discussion or assertions of errors[.]"	It is not clear how servicers are to reconcile these two provisions. We recommend an additional example of overbroad or unduly burdensome information requests: "A submission that is unreasonably lengthy in relation to what it appears to request."
49. Untimely requests, § 36(f)(1)(v)	Section 36(f)(1)(v) does not require responses to information requests submitted more than a year after the loan balance was paid in full. After a short sale, deed-in-lieu, or sale-leaseback, whether the loan is paid "in full" may not be clear, especially in states that do not permit deficiency judgments.	No response should be required more than a year after a servicer, assignee, or both, execute with a borrower or borrowers a short sale, deed-in-lieu of foreclosure, sale-leaseback, or similar nonretention foreclosure alternative.
50. Notice to borrower that servicer is not required to respond to information request, § 36(f)(2)	Section 36(f)(2) provides: "If a servicer determines that, pursuant to this paragraph (f), the servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such a determination. The notice to the borrower shall set	Servicers that receive duplicative, overbroad, untimely, abusive, or frivolous information requests should not be required to repeatedly send the § 36(f)(2) notice that no response is required. Congress directed the CFPB to put an end to abusive QWRs. RESPA § 6(k)(1)(B). There is no reason servicers should remain required to respond to abusive notices or inquiries.

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	forth the basis under paragraph (f)(1) of this section upon which the servicer has made such determination." Borrowers can repeatedly send the servicer the same request for information over and over again, and the servicer would have to send the non-response notice each time. This is unduly burdensome on the servicer and offers no consumer benefit.	We recommend that a servicer be required to send no more than two § 36(f)(2) notices in response to similar information requests in connection with the same loan.
51. General descriptions of materials withheld should be sufficient, § 36(f)(2)	If a servicer determines that it is not required to deliver requested information, it must notify the borrower within only five days: "The notice to the borrower shall set forth the basis under paragraph (f)(1) of this section upon which the servicer has made such determination."	It should be permissible for servicers to include a general description of materials withheld, to meet the 5-day deadline. It would usually not be possible to produce a privilege log in only five days, and one should not be required. A statement such as the following should be permissible: "We are not required to provide you with materials that are confidential, proprietary, privileged, or that are attorney work-product. We do not include any such information."
Force-Placed Insurance, § 37		
52. Servicers need to be able to require sufficient insurance coverage, § 37	There have been court cases questioning whether servicers can require required insurance. *See:* *Kolbe v. BAC Home Loans Servicing*, 695 F.3d 111 (1st Cir. 2012), reversing dismissal of claims that requiring flood insurance coverage equal to the replacement cost, and above the amount required by the NFIA, because the claims state a plausible breach of contract. *Lass v. Bank of America*, 695 F.3d 129 (1st Cir. 2012), reversing dismissal of claims, holding that lender did not have discretion to	We request that the CFPB make very clear that: • A servicer that complies with § 37 has the right to require insurance coverage in an amount, and of a type, that the servicer determines is permitted or required by the security instrument, investor guidelines, safety and soundness standards, or that is required by law. • The servicer may require more flood insurance coverage than the NFIA requires, such as to cover the replacement cost of the property. This is an important protection that can prevent consumers from losing their homes, as well as a safety and soundness requirement.

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	modify the flood insurance requirement during the life of the loan. *Ellsworth v. U.S. Bank*, 12-0256 (N.D. Ca. 2012), denying lender's motion to dismiss a putative class action because the mortgage can be read to restrict lender's discretion in force-placing flood insurance. *Casey v. Citibank, et. al*. 5:12-cv-820 (N.D.N.Y. 2013), denying motion to dismiss claims that mortgages did not permit servicer to increase the amount of required flood insurance coverage. *Arnett v. Bank of America*, 874 F. Supp.2d 1021 (D. Or. 2012), denying defendant's motion for judgment on the pleadings in putative class action because the mortgage does not give the mortgagee the right to set the amount of flood insurance required. This type of litigation should be unnecessary. Consumers can be seriously harmed by insufficient insurance coverage. For that very reason, servicers have a right to require insurance coverage in an amount, and of a type, that is permitted or required by the security instrument, investor guidelines, safety and soundness standards, or that is required by law.	• The amount of required insurance coverage may increase during the life of the loan. • A property that was not in a special flood hazard area ("SFHA") at origination may, in the future, be designated as in an SFHA, in which case the servicer should be able to require an appropriate amount of flood insurance coverage.
53. Servicers need to require flood insurance when not required by the FDPA, § 37(a)	Section 37(a) provides: "For the purposes of this section, the term 'force-placed insurance' means hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan." The definition does not include flood insurance required by the FDPA.	Servicers should be able to require insurance coverage even when not mandated by applicable law or when not available under the FDPA. This is both a consumer protection and a safety and soundness protection. The CFPB should state in a comment that the statement in the Model Form MS-3(D) that insurance "is required" can mean is required by the servicer even if it is not required by applicable law, or was required

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	Section 37(a)(2)(i). Servicers sometimes require flood insurance: • On properties in an SFHA but not in a participating community, so the FDPA does not apply and does not require insurance. • On properties in an SFHA but in a Coastal Barrier Resource Act ("CBRA") and Otherwise Protected Areas ("OPA") zones, where the FDPA does not apply and does not require insurance. • On a property that was designated as in an SFHA at origination, and later designated as out of an SFHA. • On a property that is in certain areas not in an SFHA, such as a Mississippi Grant Program. The Model Notices appear only to apply to instances where insurance "is required." Required by whom or what is unclear.	when making, increasing, extending, or renewing a loan, even if the property is no longer in a SFHA (*see* the next item).
54. Definition of force-placed insurance and properties remapped out of a SFHA, § 37(a)(2)	Section 37(a)(2) defines force-placed insurance to exclude insurance required by the FDPA. What is the status of flood insurance retained on a property that is remapped out of a SFHA (or on a property that is in a CBRA, OPA, or non-participating community)? If a servicer requires flood insurance on a property for the life of the loan, even if the property is remapped out of a SFHA after origination, such insurance should not be considered force-placed insurance unless the servicer is required to force-place an NFIP MPPP policy or force-place a private flood insurance policy. Continued maintenance of a borrower-purchased flood insurance policy obtained as a condition of origination is not force-placement. This is consistent with § 1024.17 which distinguishes force-placed insurance from situations in which a servicer renews borrowers' own hazard insurance policies. We seek clarity of this fact. It appears that the regulation permits renewal of	In all cases, we believe that obtaining or renewing a borrower-purchased flood insurance policy even if not mandated by the FDPA is not force-placed insurance and does not trigger § 37. Otherwise stated, servicers that continue to escrow and pay for borrower-purchased flood insurance on a property that was located in a SFHA at origination but is later remapped out of a SFHA should not be considered to be force-placing insurance. Because servicers are not required to track the continuing SFHA status of a property by law, servicers can and sometimes do require flood insurance for the life of the loan even if not mandated by FDPA to do so.

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	flood insurance only if the property remains designated as in an SFHA or the borrower consents. Requiring servicers to track SFHAs after a mortgage loan is originated is inconsistent with the FDPA and its implementing regulations. We note that the laws governing flood insurance are not federal consumer financial laws within the CFPB's authority. Congress expressly directed prudential regulators to require lenders to look at SFHA status at origination but not throughout the life of the loan: "[B]y regulation direct regulated lending institutions— (A) not to **make, increase, extend, or renew any loan** secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Administrator as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 [42 U.S.C. 4001 et seq.], unless the building or mobile home and any personal property securing such loan is covered for the term of the loan by flood insurance in an amount at least equal to the outstanding principal balance of the loan or the maximum limit of coverage made available under the Act with respect to the particular type of property, whichever is less[.]" 42 U.S.C. § 4012a(b)(1) (emphasis added). Required insurance premiums must be escrowed in certain circumstances, 42 U.S.C. § 4012a(d), but "[t]his subsection shall apply only with respect to any loan **made, increased, extended, or renewed** after the expiration of the 1-year period beginning on September 23, 1994." *Id*. at (d)(5) (emphasis added). This does not require servicers to track whether a	

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	property that was in a SFHA at origination remains in one. The prudential regulators considered, but rejected, requiring servicers to track whether properties remain designated as in SFHAs: “Proposed question and answer 2 explained that, upon a FEMA map change that results in a building or mobile home securing a loan being removed from an SFHA, a lender is no longer obligated to require mandatory flood insurance. The Agencies received one comment from an industry group suggesting the guidance in proposed question and answer 2 be amended to add language encouraging lenders to promptly remove the flood insurance requirement from a loan when the building or mobile home securing the loan is removed from an SFHA by way of a map change. The decision to require flood insurance in these instances is typically made on a case-by-case basis, depending on a lender’s risk management practices. The Agencies do not believe that a blanket statement encouraging lenders to remove flood insurance in such instances is an appropriate position; therefore, the question and answer is adopted as proposed.” 74 Fed. Reg. 35914, 35916 (July 21, 2012). And: “The agencies reiterate their view that the Reform Act does not require lenders to engage in retroactive or prospective portfolio reviews or any other specific method for carrying out their responsibilities under the Federal flood insurance statutes. The Reform Act clearly requires lenders to check the status of security property for loans when triggered by the statutory tripwires. The Reform Act did not add remappings to the list of statutory tripwires.	

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	The Reform Act does not require lenders to monitor for map changes, and the agencies will not impose such a requirement by regulation." 61 Fed. Reg. 45684, 45693 (August 29, 1996). The prudential regulators do not have authority to require life-of-loan map tracking. The prudential regulators are, but not the CFPB is not, authorized to implement flood insurance laws. The CFPB does not have authority to require life-of-loan map tracking that Congress and the prudential regulators have explicitly rejected.	
55. Insurance as a condition of a loan when voluntary coverage is unavailable, § 37(a)(2)	When voluntary insurance coverage is unavailable, lenders may require the borrower to enter into the lender's force-placed insurance program as a condition of making the loan.	We recommend that in these cases, the insurance not be defined as force-placed under § 37(a)(2).
56. Reasonable response time, § 37(c) and (g)	Section 37(c) requires servicers to notify borrowers before force-placing insurance. Section 37(g) requires servicers to refund premiums for duplicative force-placed insurance if the borrower demonstrates sufficient insurance coverage, but apparently without any requirement that the borrower act in a reasonable amount of time.	We recommend that servicers be permitted to require borrowers who have sufficient insurance coverage to demonstrate that coverage to the servicer within a reasonable amount of time, such as 60 days from the first date of coverage, as a prerequisite to applicability of § 37(g).
57. Evidence demonstrating insurance, comment 37(c)(1)(iii)-2	Comment 37(c)(1)(iii)-2 makes clear that a servicer may require a declaration page or other similar information, and may reject evidence of insurance that does not "provide[ ] confirmation" of the information. This is quite helpful. The same standard should apply uniformly, including under §§ 37(d)(2)(ii), (e)(1)(ii), and (g). There is a cross-reference to this comment in comment 37(e)(1)-1, which is also quite helpful. There is	We recommend cross-referencing comment 37(c)(1)(iii)-2 in comments under §§ 37(d)(2)(ii) and (g), to make clear that the same standard applies under those provisions as well.

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	no cross-reference in comments under §§ 37(d)(2)(ii) or (g). The standard under these provisions, absent a comment, would be "evidence demonstrating" insurance coverage. Evidence may be substantially less reliable or accurate than a declaration page, and may not be a confirmation at all.	
58. Additional information in a disclosure, § 37(c)(4), (d)(4), (e)(4)	The regulation prohibits including additional information on the insurance notices. Some additional information may be appropriate.	We request model language for disclosures as follows: • A statement providing the borrower with the correct mortgagee clause; this ensures the documentation for next year's renewal makes it to the right place, potentially avoiding the need for notification again next year. This is both a consumer convenience and a courtesy. • For bankruptcy cases, language that this disclosure is not an attempt to collect a debt. The section-by-section analysis in Regulation Z contains this language: "For example, servicers may include a statement such as: 'To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this statement is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, Creditor retains rights under its security instrument, including the right to foreclose its lien.'" 78 Fed. Reg. 10902, 10966 (February 14, 2013). We request incorporation of this language into the commentary so that its use would be protected. • A statement alerting the borrower that the servicer will offer or

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		establish an escrow account for payment of the insurance premiums. • A statement that the insurance may not protect the consumer's interest in the property. We also request clarification that it is permissible to include the loan number on the disclosures. This is important for borrowers who have more than one property, and it is important for servicers' need to manage their records.
59. Additional pages, § 37(c)(4), (d)(4), (e)(4)	The regulation requires notices to be separate: "A servicer may not include any information other than information required by [specified] paragraphs [varies] in the written notice required by [specified] paragraph [varies]. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal."	It should be permissible to include additional information on the second side of one piece of paper. This would be consistent with comments 39(b)(2)-1 and -2, which permit servicers to combine 45-day delinquency notices with other information as long as all statements meet the clear and conspicuous standard of § 32(a)(1).
60. Estimated premiums, § 37(d)(2)(i)(D), (e)(2)(viii)(C)	Notices under § 37(d)(2) and (e)(2) require an estimate of insurance premiums when the servicer does not know the exact cost. It is unclear how servicers will be required to estimate premiums. Comment 37(e)(2)(i)(D)-1 states that the estimates must be based on information "reasonably available" to the servicer when the disclosure is provided, but it is not clear what type of information servicers must or may use. The comment also states that an estimate based on the borrower's delinquency status is permissible, but does not state whether servicers must consider delinquency status in all cases. The model forms note that the premium may be estimated, but draw very little attention to the word "estimated."	• The fact that an estimated premium amount turns out to be incorrect should *per se* not be a violation of § 37, a UDAP, or a UDAAP. • We suggest examples of how servicers will be permitted to estimate premiums, such as: o Give a range of dollar amounts; o Use the average premium of force-placed insurance at any point in the past twelve months on a sample of loans, regardless of how the sample is selected; o Use 150 percent of the cost of the most recent voluntary insurance policy on the property. • Servicers should be permitted to draw attention to the fact that a premium amount is estimated, such as on the back of the page or on a separate piece of paper. Statements that the estimate is not from

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		an insurer, is not based on the same information an insurer would use, and that the actual cost may be much different than the estimate, all should be permitted.
61. Renewal of policies that predate January 10, 2014, § 37(e)	There will be some force-placed policies in effect on January 10, 2014. How the new regulation will apply to them is not clear.	We request clarification that a policy that was effective on January 10, 2014 that is renewed is subject to the renewal requirements in § 37(e), but does not need to go through the 45-day notice process for new policies.
62. Annual renewal notices, § 37(e)(5)	Section 37(e)(5) requires annual renewal notices, but does not define "year" as a calendar year or 365 days. It provides: "A servicer is not required to provide the written notice required by paragraph (e)(1) of this section more than once a year."	We request clarification that a servicer may send a renewal notice before the policy expires, and renew the policy on the expiration date. We also request clarification of annual notice timing. If a servicer sends a notice on June 1 in year 1, is the next notice due by the next June 1, or by December 31, in year 2? Operationally, it may be easier to send the notices at the same time in each calendar year. This should be permissible. This would be consistent with annual notices under Regulation P (consumer financial privacy) § 1016.5, which provides this reasonable flexibility: "(a)(1) *General rule.* You must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the continuation of the customer relationship. *Annually* means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis. (2) *Example.* You provide a notice annually if you define the 12-consecutive-month period as a calendar year and provide the annual notice to the customer once in each calendar year following the

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		calendar year in which you provided the initial notice. For example, if a customer opens an account on any day of year 1, you must provide an annual notice to that customer by December 31 of year 2.”
63. Refunds, § 37(g)(2)	Section 37(g)(2) requires that , after cancelling a policy, servicers must: “Refund to such borrower all force-placed insurance premium charges and related fees paid by such borrower for any period of overlapping insurance coverage and remove from the borrower’s account all force-placed insurance charges and related fees for such period that the servicer has assessed to the borrower.”	We request clarification that the servicer may either make a direct refund or place it in the borrower’s escrow account.
64. *Bona fide* and reasonable charge, § 37(h)(2)	Section 37(h)(2) requires charges for force-placed insurance to be *bona fide* and reasonable, defined as: “[A] charge for a service actually performed that bears a reasonable relationship to the servicer’s cost of providing the service, and is not otherwise prohibited by applicable law.”	We request clarification that the charge can include the cost of premiums, as well as the servicer’s cost of administering its force-placed insurance.
Servicing Policies and Procedures, § 38		
65. Compliance standard under § 38(a)	Section 38(a) requires servicers to “maintain policies and procedures that are reasonably designed to achieve” a list of objectives. The CFPB explains: “This revision [from the proposed rule] will also allow the Bureau to protect borrowers through robust supervision and enforcement of the servicing policies, procedures, and requirements set forth in § 1024.38 without having to demonstrate a pattern or practice of violations.”	We request clarification that: • The failure to achieve an objective is not itself a violation of the regulation; • The servicer’s selection of “reasonably designed” policies and procedures does not require the most conservative or most strict possible policies and procedures, or the most advanced technology available; and • The factors affecting the reasonableness of the policies and

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	The compliance standard is not clear.	procedures include: o The costs and resources involved in implementing, revising, and maintaining the policies and procedures; and o The servicer's need, and its affiliates' needs, to allocate resources to come into compliance with other rules, such as other Dodd-Frank rules.
66. Consumer complaints, comment 38(a)-1	Comment 38(a)-1 provides that servicers must base their policies, procedures, and requirements on, among other things, the servicer's history of consumer complaints. Not all complaints are valid or accurate, and some do not relate to servicing matters at all.	Servicers should not be required to base their policies, procedures, and requirements on baseless, unfounded, or irrelevant complaints.
67. Delegating corrections to service providers, comment 38(b)(1)(ii)-1	Comment 38(b)(1)(ii)-1 provides: *"Errors committed by service providers.* A servicer's policies and procedures must be reasonably designed to provide for promptly obtaining information from service providers to facilitate achieving the objective of correcting errors resulting from actions of service providers, including obligations arising pursuant to § 1024.35." Servicers should have the flexibility to delegate to service providers the task of correcting a service provider's errors. The comment appears to require the servicer to correct such errors directly, even if this is not the most effective method. It also assumes that information must come from a service provider, when notice of an error may come from, for example, the borrower. The source of the information is irrelevant.	The servicer, the service provider who made the error, or another service provider, should be permitted to make a correction. The source of the information used in a correction should not be relevant. We recommend amending the language as follows: *"Errors committed by service providers.* A servicer's policies and procedures must be reasonably designed to provide for **the servicer or a service provider to** promptly obtain~~ing~~ information ~~from service providers~~ to facilitate achieving the objective of correcting errors resulting from actions of service providers, including obligations arising pursuant to § 1024.35."
68. Providing information "with respect to" the mortgage loan, § 38(b)(1)(iii)	An objective under § 38(b)(1)(iii) is to: "Provide a borrower with accurate and timely information and documents in response to the borrower's requests for information	This objective should not create a "back-door discovery" avenue. We suggest that it be limited to "**reasonable** requests for information with respect to **servicing** the borrower's mortgage loan."

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	with respect to the borrower's mortgage loan[.]" This includes matters that are well beyond the scope of a servicer's role, and could reach confidential, proprietary, privileged information or attorney work product. *See* the comments above under Scope of requests that require responses, § 36(a) and 36(f)(1)(iii).	
69. Information to investors about "all mortgage loans they own," § 38(b)(1)(iv)	An objective under § 38(b)(iv) is to: "Provide owners or assignees of mortgage loans with accurate and current information and documents about all mortgage loans they own[.]" This would include loans the investor owns that another servicer services, and would include commercial loans.	It should be limited to "all **consumer** mortgage loans they own **that the servicer services.**"
70. Identifying the successor in interest, § 38(b)(1)(vi)	An objective under § 38(b)(vi) is to: "Upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower . . . ." It is not necessarily possible to identify the successor in interest "promptly." The borrower's family may not know, and may not agree. Some estates are litigated for years over this question. We are uncertain what problem the CFPB is trying to address with this objective. The family of a deceased borrower typically tries to avoid losing the property. Often, the family simply continues making payments without notifying the servicer of the borrower's death.	We recommend removing this objective. At a minimum, it should be revised to read: "Upon notification of the death of a borrower and of the borrower's successor in interest, promptly facilitate communication with the successor in interest . . . ."

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	Servicers answer questions and continue to send periodic statements and other disclosures. It is not clear what additional information the CFPB intends for the servicer to communicate to the family.	
71. Transferring information in a servicing transfer, § 38(b)(4)	Section 38(b)(4) provides that the servicing policies and procedures must be reasonably designed to ensure that the servicer can: "As a transferor servicer, timely transfer **all** information and documents in the possession or control of the servicer relating to a transferred mortgage loan to a transferee . . . ." This should not require a transferor servicer to deliver "all" information, including all copies of documents. The transferor, under § 35, will be required to respond to information requests for a year after the servicing transfer, so the transferor will need to retain sufficient information to do so. Section 38(c)(1) requires transferor servicers to retain records for a year after a transfer. If there is a transfer of servicing but no change in the document custodian, not all the information will need to be transferred. In this case, there should be no requirement that the transferor or custodian transfer the custodian's files at all.	The transferor and transferee should be able to agree on what information is required to be to transferred. This is consistent with § 38(b)(4)(ii), which seems to contemplate that the transferee will have the contractual right to receive the information it needs. If the transferor delivers all the information the agreement requires, there should be no need to transfer additional information. There is no reason to restrict information the transferor may retain.
72. Privileged or protected information in a servicing transfer, comment 38(b)(4)(i)-2	Comment 38(b)(4)(i)-2 requires: "A transferor servicer's policies and procedures must be reasonably designed to ensure that the transfer includes . . . any analysis by a servicer with respect to potential recovery from a nonperforming mortgage loan, as appropriate."	There should be an exception to this comment that permits transferors to decline to transfer information that is privileged or otherwise protected from disclosure under any applicable law or investor requirement.

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	It is possible that some of this information will be privileged or protected. Servicers do not own records related to Fannie Mae or Freddie Mac loans and may not have authority to transfer protected materials. For example, some information may be protected by the attorney-client privilege, and the privileged information is the GSE's property. The servicer should not be required to waive a GSE's privilege. Fannie Mae's Servicing Guide at § 401 provides: "All records pertaining to mortgage loans sold to Fannie Mae—including but not limited to the following—are at all times the property of Fannie Mae and any other owner of a participation interest in the mortgage loan: [lengthy list omitted.] . . . These documents and records are Fannie Mae's property regardless of their physical form or characteristics or whether they are developed or originated by the mortgage loan seller or servicer or others. The mortgage loan originator, seller, or servicer; any service bureau; or any other party providing services in connection with servicing a mortgage loan for, or delivering a mortgage loan to, Fannie Mae will have no right to possession of these documents and records except under the conditions specified by Fannie Mae. Any of these documents and records in possession of the mortgage loan originator, seller, or servicer, any service bureau, or any other party providing services in connection with selling a mortgage loan to, or servicing a mortgage loan for, Fannie Mae are retained in a custodial capacity only." Freddie Mac's Servicing Guide at § 52.5 similarly provides:	

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	"All documents in the Mortgage file, all data related to Mortgages owned or guaranteed by Freddie Mac to which the Servicer obtains access in connection with any agreement with Freddie Mac, including, without limitation, data in the documents in the Mortgage file (collectively, Mortgage data) and all other documents and records related to the Mortgage of whatever kind or description (whether prepared or originated by the Servicer or others, or whether prepared or maintained or held by the Servicer or others acting for and on behalf of the Servicer), including all current and historical computerized data files, will be, and will remain at all times, the property of Freddie Mac. All of these records and Mortgage data in the possession of the Servicer are retained by the Servicer in a custodial capacity only. . . . Except as expressly authorized by Freddie Mac in writing, Servicers may not use or disclose, or authorize or permit third parties to use or disclose, these records or Mortgage data for any other purpose, including, without limitation, resale or licensing of Mortgage data, either alone or with other data."	
73. Informing borrowers of how to submit error assertions and information requests, § 38(b)(5)	Section 38(b)(5) requires servicers to have policies and procedures reasonably designed: "to ensure that the servicer informs borrowers of the procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36." Comment 38(b)(5)-1 provides that servicers may comply: "by including in the periodic statement . . . a brief statement informing borrowers that borrowers have certain rights under	These appear inconsistent. The regulation is limited to informing borrowers of how to submit error assertions and information requests. The comment appears to also require informing consumers of their rights to submit error assertions and information requests and how to learn more about their rights. It also appears to require making available a description of the applicable procedures, nit just for submitting, but also for processing and responding to error assertions and information requests. We suggest that the CFPB rather than servicers is in a position to inform borrowers of their legal rights. We recommend that servicers be

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	Federal law related to resolving errors and requesting information about their account, and that they may learn more about their rights by contacting the servicer, and a statement directing borrowers to a Web site that provides a description of the procedures set forth in §§ 1024.35 and 1024.36. Alternatively, a servicer may also comply with § 1024.38(b)(5) by including a description of the procedures set forth in §§ 1024.35 and 1024.36 in the written notice required by § 1024.35(c) and § 1024.36(b).”	required to inform consumers of how to submit error assertions and information requests, which certainly would indicate that they can do so. We suggest that this should be sufficient.
74. Compiling servicing file in five days, § 38(c)(2)	Section 38(c)(2) requires servicers to retain certain information “in a manner that facilitates compiling such documents and data into a servicing file within five days[.]”	The five-day requirement should mean business days and not calendar days. If it is calendar day and a there is a weekend or a holiday during the five days, the servicer could have as little as two days to compile the information, which is unreasonably short.
75. Servicer’s notes as part of the servicing file, § 38(c)(2)(iii)	Section 38(c)(2)(iii) defines the servicing file to include: “Any notes created by servicer personnel reflecting communications with the borrower about the mortgage loan account[.]” In some circumstances, a servicer may be required to produce this information. However, servicers’ notes may not be in language plain enough for consumers to understand.	If a servicer is required to produce its notes to a consumer, we request clarification that the servicer may produce a summary of its notes, or a “translation” into plain language.
76. Report of data fields, § 38(c)(2)(iv)	Section 38(c)(2)(iv) requires servicers to maintain and to be able to access: “To the extent applicable, a report of the **data fields** relating to the borrower’s mortgage loan account created by the servicer’s electronic systems in connection with servicing practices[.]” The section-by-section analysis explains that this:	We recommend that if a servicer maintains data in a manner that facilitates accessing, within five business days, each data field for each loan, the servicer should be deemed in compliance. Preparing or printing a report of the data fields should not be required. It should be clear that § 38 and the requirement to report all data fields is for the purpose of servicer access to data and for reporting to examiners only.

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	"[M]eans a report listing the relevant data fields by name, populated with any specific data relating to the borrower's mortgage loan account." 78 Fed. Reg. 10696, 10787 (February 14, 2013). The purpose of this requirement is unclear. It appears to be designed so that servicers and CFPB examiners will have access to loan data. If this is so, then the purpose or requiring a "report listing the relevant data fields" appears unnecessary. If a servicer needs to know, for example, the current escrow balance on a loan, the servicer's staff knows how to find that information. What is the purpose of a report that "we store escrow account balances for escrowed loans"? The reference to "data fields" is problematic because it is overbroad and vague. The term encompasses thousands of data elements without limitation. It is unclear why servicers who have access to their data should be required to create a new report of data fields. In a supervisory case, if the CFPB finds that a servicer cannot access data it needs, then perhaps a report may be appropriate. Otherwise, this provision seems an exercise in creating unnecessary paperwork without addressing an identified problem.	It should be clear that §§ 38 and 36 do not require servicers to provide all the data fields to a borrower who requests a servicing file. We urge the CFPB to indicate in Official Staff Commentary that requiring a servicing file that identifies **all, or even a number of, data fields** would be an overbroad and unduly burdensome request, and may include proprietary information. If the CFPB expects that servicers will provide information about the data fields to the borrower, limitations must be placed on the requirement. We request that servicers be required to provide the borrower with only those data fields necessary to resolve an error request or necessary to answer a specific information request (*e.g.* the servicer need only accesses the data necessary to answer the question, but need not provide all data fields upon request). Proprietary, confidential, privileged or protected information should never be required to be disclosed.
77. Data fields – timing § 38(c)(2)(iv)	Section 38(c)(2)(iv) requires servicers to maintain and to be able to access: "To the extent applicable, a report of the **data fields** relating to the borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices[.]"	Servicers should be able to provide the information in the data fields as of a specific date if that is all that is required to respond to the servicer's needs or to the examiner.

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	What point in time must be reflected in the "report of the data fields[?]"	
78. January 10, 2014 compliance date, comment 38(c)(2)-1	Comment 38(c)(2)-1 provides that the servicing file requirement does not apply retroactively: "A servicer complies with § 1024.38(c)(2) if it maintains information in a manner that facilitates compliance with § 1024.38(c)(2) beginning on or after January 10, 2014. A servicer is not required to comply with § 1024.38(c)(2) with respect to information created prior to January 10, 2014." This is certainly helpful, but does not address situations when a servicer is unable to obtain records, such as when a transferee acquires servicing from a bankrupt transferor servicer.	Servicers should not be required to maintain information they are unable to obtain. If a transferor servicer fails to or is unable to transfer relevant information, the transferee should not be in violation of any law, whether the information was created before or after January 10, 2014.
Early Intervention, § 39		
79. Live contact within day 36 of delinquency, § 39(a)	Section 39(a) provides: "A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency[.]" Comment 39(a)-1.i explains: "Delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee."	We request clarification that the servicer need not attempt to establish live contact for each delinquent payment in a continuing delinquency. We request clarification that servicers have flexibility to comply with investor requirements that differ from the regulation in the event of a disaster.

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	If there is a disaster and an investor instructs a servicer of loans in the area to cease collection-related communication for a period of time, this could conflict with the regulation.	
80. Date of delinquency after servicing transfer, comment § 39(a)-1.iii	Comment 39(a)-1.iii provides: "During the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly."	It is helpful that this applies only if the transferee is aware that the borrower made a timely payment to the transferor. A transferee should be required to treat only one misdirected payment from the same borrower as timely. There is no need to notify borrowers repeatedly of the same information. One misdirected payment may be an error, but the second one likely is not. The borrower may assume that the transferor will not cash the check, meaning mailing a check that would bounce to the transferor is a method to avoid having a delinquent payment treated as delinquent. The requirement that the transferee treat a payment as timely even when the servicer has not received it should never apply to any of the servicer's duties to investors, it should only apply to the servicer's duties with regard to the borrower. We recommend a comment making this clear.
81. Good faith efforts to establish live contact, comment 39(a)-2	Comment 39(a)-2 provides, in part: "Good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer." This standard is vague. Not only does it not define what the servicer	We recommend clarification that a servicer is deemed to have made a "reasonable effort" to solicit a borrower if over a period of at least 30 calendar days the servicer made a minimum of four telephone calls to the last known phone numbers of record, at different times of the day.

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	must do, it does not identify which “circumstances” are relevant.	
82. Promptly informing borrowers of loss mitigation options, comment 39(a)-3.ii	Servicers must attempt to make live contact within 36 days of delinquency. Comment 39(a)-3.ii provides: “[T]he servicer must provide [loss mitigation] information promptly after the servicer establishes live contact. A servicer need not notify a borrower about any particular loss mitigation options at this time; if appropriate, a servicer need only inform borrowers generally that loss mitigation options may be available. If appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written [45-day delinquency] notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact.” This does not make clear when it is “appropriate” to include the information on loss mitigation options in the 45-day delinquency notice.	We recommend additional clarity. • It should be permissible to mail information on loss mitigation options within five days of establishing live contact. • If the servicer is unable to make live contact because the borrower does not respond to outreach, it should be permissible to send information on loss mitigation options within five business days of the 45-day delinquency notice.
83. Authenticating an agent before providing information on loss mitigation options, comment 39(a)-4	Comment 39(a)-4 provides: “Section 1024.39 does not prohibit a servicer from satisfying the requirements § 1024.39 by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower’s behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower’s behalf, for example, by requiring a person that claims to be an agent of the borrower provide documentation from the borrower stating	The time servicers spend waiting for a borrower or agent to provide information verifying the agent’s authority should not count against the servicer’s compliance with the requirement to make live contact or to send the 45-day delinquency notice. This recommendation is the same treatment in comments 35(a)-1 and 36(a)-1, relating to the time to respond to error assertions and information requests. Those comments permit servicers to treat the error assertion or information request as received “[u]pon receipt of such documentation” from the borrower that the agent has authority to act on the borrower’s behalf. It is also similar to Regulation Z comment

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	that the purported agent is acting on the borrower's behalf."	36(c)(3)-1, which permits creditors to verify the authority of an agent who requests a payoff statement before the time for delivering a payoff statement begins to run.
84. One notice during 180 days, § 39(b)(1)	Section 39(b)(1) requires a written notice within 45 days of a loan becoming delinquent. It also provides: "A servicer is not required to provide the written notice more than once during any 180-day period." If a servicer mails a 45-day delinquency notice on February 15, the borrower comes current on March 1, and does not make the April 1 or May 1 payments, is a new 45-day delinquency notice required?	We request clarification that a written notice is not required more that once during any 180-day period, even if the borrower cures and redefaults one or more times during the 180 days. We request clarification that a servicer need only provide one 45-day delinquency disclosure if the borrower remains delinquent, for example, for 300 consecutive days because that borrower is only 45-days delinquent once. We request clarification that, if the loan in the example were to remain delinquent, the second notice must be mailed on or before 180 days after February 15.
85. Incorrect cross-reference, § 39(b)(1)	The reference in § 39(b)(1) to "paragraph (a)(2)" means paragraph (b)(2).	
Continuity of Contact, § 40		
86. Authenticating an agent before assigning personnel and assisting borrower through agent, comment 40(a)-1	Comment 40(a)-1 provides: "A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example by requiring that a person who claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf."	The time servicers spend waiting for a borrower or agent to provide information verifying the agent's authority should not count against the servicer's compliance with the requirement to assign personnel and begin assisting the agent. This recommendation is the same treatment in comments 35(a)-1 and 36(a)-1, relating to the time to respond to error assertions and information requests. Those comments permit servicers to treat the error assertion or information request as received "[u]pon receipt of

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		such documentation" from the borrower that the agent has authority to act on the borrower's behalf. It is also similar to Regulation Z comment 36(c)(3)-1, which permits creditors to verify the authority of an agent who requests a payoff statement before the time for delivering a payoff statement begins to run.
87. Two consecutive payments without a late charge, § 40(a)(2)	Section 40(a)(2) requires servicers to make contact personnel available: "[U]ntil the borrower has made, without incurring a late charge, two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement."	We request clarification that this means that the borrower did not incur a late charge because the two consecutive payments were made in time or within any grace period, and not that the servicer is required to waive applicable late fees after a permanent modification.
88. Complete payment history, § 40(b)(2)(i)	Section 40(b)(2)(i) requires servicers to maintain policies and procedures reasonably designed to ensure that the personnel assigned to a delinquent borrower are able to timely retrieve a "complete record of the borrower's payment history[.]" This presumes the complete history will always be available, but it may not be.	Servicers should not be required to retrieve information they are not able to obtain. This provision should be consistent with: • Section 38(c)(2)-1, which provides that the servicing file requirement does not apply retroactively. • Comment 39(a)-1.iii, which acknowledges that a transferor servicer may not be aware of a payment sent to the transferee within 60 days of a servicing transfer. • The possibility that a transferor servicer may be unable to transfer relevant information.
89. Providing error assertion information, § 40(b)(4)	Section 40(b)(4) provides: "A servicer shall maintain policies and procedures reasonably designed to ensure that servicer personnel assigned to a delinquent borrower . . . [p]rovide a delinquent borrower with information about the procedures for submitting a notice of error pursuant to § 1024.35 or an information request pursuant to § 1024.36." It should not matter who provides the information, only that someone	We request clarification that this does not require a separate notice to every borrower to which personnel are assigned, by each of those assigned persons. We recommend that the servicer be permitted to provide the information in any reasonable manner, and that providing the information in a periodic statement or with a 45-day delinquency notice is *per se* reasonable.

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	does.	
Loss Mitigation Procedures, § 41		
	See also the entry under § 31, Exceptions to the definition of loss mitigation option	
90. Number of days before foreclosure, § 41 generally	Section 41 sets several requirements and prohibitions based on the number of days before a foreclosure sale. This presumes the servicer knows precisely how many days until a foreclosure sale will occur, but this may not be the case. For example, § 41(b) requires servicers who receive incomplete loss mitigation applications to notify borrowers of the missing information, and of a deadline for submitting that information that may be based on the date that is 38 or 90 days before a foreclosure sale. The servicer will not know this date. A notice under § 41(b)(2)(i)(B) to the borrower that there is a deadline for completing the application, but that the servicer does not know the deadline, would be required but would also be more confusing than helpful. Suppose a servicer notifies a borrower on March 5 that the deadline is June 1, which is the date on which the financials become stale under § 41(b)(2)(ii)(a), and no foreclosure is yet scheduled. If on March 30, the servicer learns that a foreclosure sale is scheduled for April 30, the application deadline would be advanced. This will cause the borrower to feel cheated, and UDAAP litigation is a likely result, although the servicer did as the regulation directed. Moreover, the servicer in this case could be found to have violated the regulation for having sent a notice that did not state "the earliest remaining date" within the meaning of § 41(b)(2)(ii). This regulation requires servicers to do the impossible, and attaches liability for noncompliance. This is	We very strongly urge the CFPB to amend its regulation to measure time periods with certainty. There should be no litigation over servicers' ability to predict foreclosure sale dates. There should be no notices that confuse or misinform borrowers. The regulation should not interfere with servicers' ability to meet GSE requirements.

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	fundamentally unfair. The section-by-section analysis explains: "For example, § 1024.41 imposes requirements with respect to complete loss mitigation applications received more than 37 days before a foreclosure sale. This is consistent with the National Mortgage Settlement and GSE requirements." 78 Fed. Reg. 10696, 10822 (Feb. 14, 2013). The regulation measures time quite differently than the 50-state settlement agreement, the GSEs, or FHA. Notably, the 50-state settlement, the GSEs, and FHA do not use unknown dates in setting their timeframes. The following are apparent inconsistencies between the regulation and the GSE requirements: • Section 41(c)(1) requires evaluation of a complete loss mitigation application within 30 days, if the servicer receives it more than 37 days before a foreclosure sale even if the date of the sale is unknown. The GSEs require the same if the application is received before a foreclosure referral; but if the application is received after the referral, whether the GSEs permit 30 days to evaluate the application depends on the scheduled foreclosure sale. If an application is received when a foreclosure sale date is unknown, the requirements appear inconsistent. The regulation appears to require the servicer to know the unknown. If a servicer assumes that a foreclosure is more than 37 days away and begins to evaluate an application, and within 15 days learns that the foreclosure sale is 14 days away, what is required is unclear.	

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	• Both GSEs require foreclosure referrals by day 120 of delinquency in most cases, and penalize servicers for noncompliance. The CFPB's regulation needs to permit compliance with the GSEs' requirements. Specifically, if a borrower submits an incomplete loss mitigation application at 110 days delinquent (10 days before the GSEs require a foreclosure referral), the servicer continues to try to obtain missing information but the borrower does not provide it, the servicer should be permitted to refer the loan to foreclosure on day 120. Section 41(c)(2)(ii) seems to imply that the servicer must wait "for a significant period of time under the circumstances" for the borrower to complete the application. Ten days may not be "a significant period of time" and the regulation appears inconsistent with the GSEs' requirements. • Section 41(f)(1) prohibits servicers from making the "first notice or filing" (a vague term, as discussed below) until the loan is "more than" 120 days delinquent. The GSEs usually require a foreclosure referral by day 120, a day earlier than the regulation apparently permits. This is not workable. • Section 41(g) prohibits moving for a foreclosure sale if the borrower submits a complete application after the first notice or filing and more than 37 days before a foreclosure sale, even if that sale date is unknown. This requires compliance with the unknown. The GSEs do not require a delayed foreclosure action if a complete application is received 38 or more days before a scheduled foreclosure sale because there is enough time to review the application and to complete the pre-foreclosure certification. *See* Fannie Mae's Aril 25, 2012 revision to Announcement 2011-08R, FAQ 37. • There is no GSE requirement that servicers identify a date in any notice that could potentially "spring back" and make the notice	

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	inaccurate after the consumer receives it and, potentially, detrimentally relies on it. A significant difference between the regulation and the requirements of the 50-state settlement, the GSEs, and FHA is that the regulation creates a private right of action under § 41. Penalties for noncompliance with the 50-state settlement and the GSE and FHA requirements exist, but only when the servicer does not comply with known requirements. Under § 41, liability for a servicer's inability to guess foreclosure sale dates, sometimes 90 days into the future, will result. Litigation over blind guesses of events far off into the future would be unreasonable, and the cost of that litigation would need to be included in the future cost of consumer mortgage credit.	
91. Submitting or receiving applications, § 41 generally	Section 41(f)(2) and (g) use the phrase "a borrower submits a complete loss mitigation application" but elsewhere the regulation uses the phrase "servicer receives" a complete loss mitigation application or something similar. *See* § 41(b)(1), (b)(2)(i), (c)(1), (e)(1).	We request clarification that there is no difference between the similar phrases, and that an application is not complete until the servicer actually receives everything the servicer requires the borrower (or the borrower's agent) to submit.
92. Evaluations in the servicer's discretion, § 41(a) and comment 41(c)(1)-1	Section 41(a) provides: "A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law."	We request clarification that state attorneys' general and federal or state regulators cannot enforce § 41 because they are not "a borrower" under § 41(a). The CFPB should state explicitly in a comment that failure to allow loss mitigation options is in no circumstance a breach of a mortgage loan contract with a borrower, a violation of Regulation X, a UDAP, or a UDAAP.

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	Comment 41(c)(1)-1 provides: "The conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer. A servicer meets the requirements of § 1024.41(c)(1)(i) if the servicer makes a determination regarding the borrower's eligibility for a loss mitigation program. Consistent with § 1024.41(a), because nothing in section 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option, § 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer." This comment is quite helpful.	
93. Definition of loss mitigation application, § 41(b)(1)	Comment 41(c)(2)(i)-1 states that nothing in § 41(c)(2)(i) prohibits a servicer from offering loss mitigation options to a borrower who has not submitted a loss mitigation application. "For example, if a servicer offers trial loan modification programs to all borrowers who become 150 days delinquent without an application or consideration of any information provided by a borrower in connection with a loss mitigation application, the servicer's offer of any such program does not violate § 1024.41(c)(2)(i), and a servicer is not required to comply with § 1024.41 with respect to any such program, because the offer of the loss mitigation option is not based on an evaluation of a loss mitigation application."	A servicer may offer a modification based on, instead of a complete application, a certain number of days delinquent, a FICO score, and/or the property being within an acceptable federally declared disaster area. In this case, must the servicer evaluate the borrower for all loss mitigation options pursuant to § 41(c)? Does the response change if the servicer requires a signed hardship affidavit?

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94. Reasonable due diligence, § 41(b)(1)	Section 41(b)(1) provides: "A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application." Comment 41(b)(1)-4.1 gives as an example of reasonable diligence: "A servicer requires additional information from the applicant, such as an address or a telephone number to verify employment; the servicer contacts the applicant promptly to obtain such information after receiving a loss mitigation application[.]" This acknowledges the fact that the initial notice may not be able to include each piece of information conceivably required to complete an application. In five days, the servicer will have time for an initial review, but not time for full underwriting. Underwriters may later determine additional information is required.	Two notices need to be permitted. The first notice is early, within 5 days, but is therefore limited to an initial review. Thereafter, the servicer may determine that more specific information is required. The servicer should be permitted to request the more specific information after the initial notice, as long as the initial notice listed all information the servicer then knew would be required to make the application complete. We request clarification that placing a notice in the mail that states what then-known information is missing, within five days of receipt of an incomplete application, is reasonable due diligence within the meaning of § 41(b)(1). We recommend that a servicer later be able to notify the borrower of additional underwriting information that is required. If this is not permitted, the servicer would need to be able to deny the application because the servicer cannot determine whether the application met investor mitigation requirements. We recommend adding to the commentary that one example of reasonable diligence is sending two letters following up on the missing documents. This standard is consistent with Treasury's HAMP program.
95. Notice of missing application information and application deadlines, §§ 41(b)(2)(i)(B) and 41(b)(2)(ii)	Section 41(b)(2)(i)(B) requires servicers to notify borrowers within five business days of any information missing from a loss mitigation application, if the servicer receives a complete application more than 45 or more days before a foreclosure sale. Section 41(b)(2)(ii) notices: "[M]ust state that the borrower should submit the documents and	There needs to be certainty about the deadline for completing loss mitigation applications. Given that the rule requires a notice of default at day 45 of delinquency, and that starting a foreclosure is prohibited before day 121 of delinquency, borrowers will have at least 76 days to complete a loss mitigation application. This is more than ample time, so there is no reason for unworkable rules.

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	information necessary to make the loss mitigation application complete by the earliest remaining date of:
	(A) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;
	(B) The date that is the 120th day of the borrower's delinquency;
	(C) The date that is 90 days before a foreclosure sale; or
	(D) The date that is 38 days before a foreclosure sale."
	
	There are several issues with this notice requirement:
	• The servicer may not know whether the borrower submitted the information 45 or more days before a foreclosure sale, and therefore may not know whether the notice is required.
	• If the foreclosure sale date is unknown but the servicer sends a notice stating that the deadline is, for example, under (A), 75 days in the future, but a foreclosure sale is thereafter scheduled for a date earlier than the deadline the servicer gave the borrower, the notice would be more confusing than helpful.
	  o In this event, does the rule require a servicer to postpone the foreclosure sale?
	  o If so, may servicers set the date at which documents become stale as the earlier of X days or the date of a scheduled foreclosure sale?
	• Deadlines (C) and (D) will often be unknown. If a servicer must tell a borrower that the deadline is 90 or 38 days before a foreclosure and that the servicer does not know what date that is, the notice would be more confusing than helpful.
	• Requiring servicers to send a potentially inaccurate or misleading
		We do not object to permitting borrowers to submit non-duplicative, complete applications late in a delinquency. However, the requirements for evaluating these applications need to be defined by known deadlines.
		
		We recommend:
		• Removing the requirement to identify the list of four dates.
		• Incomplete applications should not delay otherwise appropriate foreclosures. Otherwise, incomplete applications would become an easy tool for delaying otherwise appropriate foreclosures. Especially given that the borrower has already had ample time, this should be unnecessary.
		• Non-duplicative, complete applications submitted after the 90th day of delinquency should not delay a foreclosure. Evaluation of these late applications should be required only if there is time to evaluate the application before a scheduled foreclosure sale date.
		• Servicers should be permitted to set reasonable deadlines for receipt of a complete application, such as:
		  o The 90th day of a delinquency; and
		  o The earlier of (i) 38 days before a *scheduled* foreclosure sale, or 30 days after a notice of missing documents. These dates would vary depending on how close to foreclosure the borrower is (*e.g.* a 30-day timeline for the borrower to return missing documents may not be reasonable if judgment and/or the scheduling of the foreclosure sale by the court are pending). Diligent borrowers will complete their applications within day 90 of delinquency. If they wait until later, they risk losing the opportunity to appeal a modification denial, and they risk not

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	disclosure is a disservice to the borrower and could subject the servicers to liability. A more appropriate disclosure is warranted. Section 205.04 of Fannie Mae's Guide provides that the stale date of documents is determined from the date of a complete application: "The borrower's income must be supported by documentation that is not more than 90 days old as of the date the servicer first determines that the borrower submitted a complete Borrower Response Package [application]." Freddie Mac's guide is similar. *See* § 65.18(a).	having time for evaluation of their application. Servicers should not have to delay foreclosure for delayed actions of the borrower. • Failure to complete an application timely will render the application dormant, but not declined. Servicers are still free to consider the application, but will have some certainty in designing compliance procedures. • If the borrower submits an incomplete application, notice to the borrower of what is missing should also state: o The borrower should complete the application as soon as possible; o The servicer will need 30 days to evaluate the application after it is complete; o If a foreclosure sale is scheduled before the 30-day evaluation period, the servicer may not be able to complete its evaluation. • Servicers should be permitted to provide a generic statement of when documents become stale. A statement that "the documents you submit remain current and we can use them for 90 to 120 days after their effective date" should suffice. Otherwise the disclosure could get unworkably long because the borrower may have submitted, for example, a bank statement dated February 1, a paystub dated March 1, and different stale dates may apply to different documents. Five days may be too short to compile a complete list of the expiration date of each document. We recommend that a general warning that delays in completing an application could cause documents to become too old, and could require the borrower to submit updated information. • Servicers should be able to encourage borrowers to submit their applications as soon as possible. If the stale date of documents is

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		based on the date of a complete application (as with the GSEs), the servicer will not know that date. In this case, servicers should not be required to notify borrowers of a specific stale date. • We do not object to disclosures about the foreclosure timelines, but we cannot support requiring disclosures that servicers do not know how to complete. Any timeline disclosures should be general, and it should be permissible to state that some of the events may have already passed. • If a servicer notifies a borrower of missing information and the borrower thereafter supplies some, but not all, of the specified information, a second notice should be permissible, but not required because it would be redundant. • If a borrower does not submit the specified information by the deadline, servicers should be permitted to close the request due to incomplete information. This would not preclude the borrower from completing the application later if there is time for the servicer to evaluate the application. • The required notice of missing information should be restricted to then-relevant information. For example, if a borrower applies for a loan modification, the servicer should only tell the borrower of any missing information needed for a modification application. If the servicer does so, but the borrower does not obtain a modification, and later applies for a short sale, the earlier communication of missing modification information should not be a violation. This would seem consistent with comment 41(c)(1)-3, which permits servicers to require additional third-party information for a non-home retention option.
96. Must or should submit	Section 41(b)(2(i)(b) provides that when a borrower submits an	The purpose of this notice is to communicate that failure to complete an

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documents, § 41(b)(2)(i)(B) and (b)(2)(ii)	incomplete application, the servicer must notify the borrower of: "the additional documents and information the borrower *must* submit to make the loss mitigation application complete . . . ." Section 41(b)(2)(ii) requires the same notice to: "state that the borrower *should* submit the documents and information necessary to make the loss mitigation application complete . . . ."	application by a deadline would have negative consequences for the borrower. The servicer should be able to communicate this in clear language. A notice that the borrower should complete the application as soon as possible, and must complete it in time for the servicer to be able to evaluate it, would be appropriate.
97. Evaluation for all loss mitigation options available, § 41(c)(1)(i)	Section 42(c)(1)(i) provides that, in some circumstances, a servicer that receives a complete loss mitigation application must: "Evaluate the borrower for all loss mitigation options available to the borrower[.]" Comment 41(c)(1)-3 provides: "A servicer's offer of a non-home retention option may be conditional upon receipt of further information not in the borrower's possession and necessary to establish the parameters of a servicer's offer. For example, a servicer complies with the requirement for evaluating the borrower for a short sale option if the servicer offers the borrower the opportunity to enter into a listing or marketing period agreement but indicates that specifics of an acceptable short sale transaction may be subject to further information obtained from an appraisal or title search" These appear inconsistent.	We request clarification that there may be two evaluations. The initial evaluation, after receipt of a modification application, is for a trial or permanent modification. Thereafter, if no modification occurs, and if the borrower and property are eligible for a non-retention alternative, the servicer should be able to require additional information to evaluate a non-retention alternative. We also request clarification that if a servicer's or government agency's waterfall allows the servicer to by-pass home retention offers when the borrower does not want to retain the home, that servicers need not evaluate the borrower for home retention options. Similarly, if a borrower is uninterested in a modification, there should be no requirement to evaluate the borrower for a modification, or to notify the borrower of missing modification application information. FHA and other short-sale programs prohibit offering a short sale marketing period until an appraisal and title are complete. The rule implies that servicer must offer the marketing period first before the agencies' conditions are met. This forces servicers to be out of

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		compliance with one of the rules.
98. Third party fails to submit required application information, § 41(c)(2)(ii), § 41(h) and § 38(b)(2)(v)	Section 41(c)(2)(ii) provides: "[I]f a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option." Section 38(b)(2)(v) requires servicers to have policies and procedures reasonably designed to ensure that servicers can: "Properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan and, where applicable, in accordance with the requirements of § 1024.41." A servicer may receive all information required from a borrower but, due to reasons beyond a servicer's control, may not receive all information required from a third party. In this case, the servicer will not be able to evaluate the application.	Both of the cited provisions need to take into account the possibility that a servicer may receive all information required from a borrower but not from a third party. In this situation, we recommend that the servicer can elect to do any or all of the following: • Treat the application as incomplete for purposes of § 41(c), 41(f)(2) and 41(g), so that evaluation of the application is permissible but not required. • Treat the borrower as not eligible for the loss mitigation applied for within the meaning of § 38(b)(2)(v), because a "proper" evaluation is not possible. If a servicer denies an application for a modification and the borrower appeals, the servicer has only 30 days to decide the appeal. If the servicer requires third party information to determine an appeal but does not timely receive it, the servicer should be permitted to deny the appeal on that basis.
99. Denial notices, § 41(d)(1)	Section 41(d)(1) requires denial notices to state:	We request clarification that a summary of the primary reasons is sufficient.

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	"If a borrower's complete loss mitigation option is denied for any trial or permanent loan modification option available to the borrower . . . a servicer shall state in the notice sent to the borrower . . . (1) The specific reasons for the servicer's determination for each such trial or permanent modification option[.]"	We request clarification that if a borrower or property do not meet basic modification eligibility criteria (*e.g.,* owner-occupancy), that the modification is not "available to the borrower." Otherwise, the servicer could be required in these cases to unnecessarily run the NPV analysis, calculate the DTI, and so on, and list these if they are additional reasons for denial. We request clarification of the procedure if a borrower is simultaneously approved for one modification and denied for another. • Is a denial notice required? • Is an appeal available? If so and the borrower appeals the denied modification, but the date for accepting the approved modification lapses while the appeal is pending, and the borrower loses the appeal, is the approved modification available to the borrower? • The servicer should be able to require the borrower to accept and comply with the approved loss mitigation option, pending appeal of a denied modification, or to reject the approved loss mitigation option. Otherwise, the terms of the offered mitigation could be materially altered by arrearages or tax or insurance payments.
100. First foreclosure notice or filing, § 41(f)(1), (f)(2), (g) (j), and § 35(b)(9)	Section 41(f)(1) and (j) prohibit making "the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process" until a loan is 121 days delinquent. If a borrower submits a complete loss mitigation application within the first 120 days of delinquency, § 41(f)(2) prohibits the servicer from making "the first notice or filing required by applicable law for any judicial or non-judicial foreclosure" until the servicer processes the application. Section 41(g) in some cases prohibits moving for a foreclosure judgment or sale "after a servicer has made the first notice or filing	We suggest instead that the first notice or filing be limited to the first action required by law as defined by FHA, referred to as the **first public action** (*i.e.*, an action that will be publically available, even if time elapses before it actually becomes public**)**: "HUD considers foreclosure instituted when the mortgagee takes the first public action required by law such as filing a complaint or petition, recording a notice of default, or publication of a notice of sale. Merely posting notice on the property is not sufficient. The

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	required by applicable law for any judicial or non-judicial foreclosure process" if an application is pending. Section 35(b)(9) defines an error to include "[m]aking the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j)." Comment 41(f)(1)-1 explains (emphasis added): "The first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, **or provided to a borrower** as a requirement for proceeding with a judicial or nonjudicial foreclosure process. Such notices or filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation." This definition of the "first notice or filing" is unclear, contradictory, and unworkable, and is unrelated to nonpayment defaults. As amended, Regulation X requires a notice to a borrower who is 45 days delinquent. That 45-day delinquency notice is required before a servicer can foreclose, and therefore, that notice under § 41(e)(2) and (f)(1) could be the "first notice . . . required by applicable law . . . to a borrower" before proceeding with a foreclosure. That 45-day notice also appears to be a "notice of default" within the comment's list of examples of what the regulation prohibits. Thus, it appears that the required 45-day delinquency notice is prohibited before the loan is 121	action must be established as a public record through a filing, recording, or a publication in a newspaper of general circulation as required by law." HUD Claims Handbook 4330.4, Chapter 2-2 (1994). HUD's Mortgagee Letter 2005-30 lists "the first legal action necessary to initiate foreclosure on a mortgage and of the typical security instrument used in each state." This letter identifies as the "first legal action" only formal actions, such as a recorded notice of default, filing foreclosure documents with a public trustee, filing a complaint, publication in a newspaper of general circulation, and so on. Unlike § 41, FHA does not consider sending a notice to the borrower, alone, as the first notice or filing initiating a foreclosure. Fannie Mae does not use this "first legal action" standard, but instead requires that the loan be referred to an attorney (or trustee) to initiate foreclosure by the 120th day of delinquency, provided any applicable state law notice and waiting period is met. FNMA Announcement SVC 2011-08R (page 17). The first "public action" as defined by FHA above would generally occur after the referral to foreclosure attorney. Either the FHA or the GSE standard would be workable. The § 41 standard contradicts itself. It is critical that a clarification indicate that all of § 41 does not apply to nonpayment defaults.

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	days delinquent. Regulation Z requires servicers to modify the periodic statement when a loan is 45 days delinquent by including additional information. This information similarly could fall within the meaning of the “first notice or filing,” and appears to be a “notice of default” within the comment’s list of examples of what the regulation prohibits. This 45-day requirement also appears to be prohibited until the loan is 121 days delinquent. Additionally, if a delinquent borrower calls a servicer about the default, it would be difficult for the servicer to avoid giving the borrower information about a default. In effect, the servicer could be “required” to provide “notice” of the default by phone, but that appears to be prohibited before the loan is 121 days delinquent. The requirement to attempt to establish live contact could also be a notice to a borrower required before proceeding with a foreclosure. Making personnel available by phone to a delinquent borrower apparently also is a notice to a borrower required before foreclosure. Section 41(f)(1) is not limited to written notices. Moreover, the definition appears to vary based on investor requirements. For example, if investor A offers no loss mitigation and investor B does, and B’s borrower submits a loss mitigation application, the servicer is required to provide that borrower with a notice of receipt, notice of missing information, notice of any decision on the application, and so on. Each of these notices could be included within the meaning of first notice or filing and prohibited before the loan is 121 days	

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	delinquent. Further, not all foreclosures are based on payment default. For example, a borrower may demolish the home and refuse to rebuild it, may sell the property to a friend or family member without the servicer's consent, or may store hazardous substances on the property, and thereby be in default even if all payments are timely. Nonpayment defaults should be completely exempt from § 41 because they are unrelated to the borrower's ability to pay, or to the benefit of loss mitigation options. These are examples of strategic defaults, not of need for consumer protection. Even if the "first notice or filing" were to exclude all RESPA and TILA notices, the contradictory requirements problem would remain because states and investors require various notices to delinquent borrowers before the loan is 121 days delinquent. FHA's regulations require certain servicer actions within time limits measured from the date of delinquency. FHA extends the time when state law or bankruptcy law prohibit the FHA timelines, but not when another federal law, such as Regulation X, prohibit the FHA timelines. Therefore, servicers cannot comply with both FHA and CFPB rules. 24 C.F.R. § 203.355(c) provides: "(c) *Prohibition of foreclosure within time limits.* If the laws of the State in which the mortgaged property is located, or Federal bankruptcy law: (1) Do not permit the commencement of foreclosure within the time limits described in paragraphs (a), (b), (g), (h) and (i) of this section,	

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	the mortgagee must commence foreclosure within 90 days after the expiration of the time during which foreclosure is prohibited; or (2) Require the prosecution of a foreclosure to be discontinued, the mortgagee must recommence the foreclosure within 90 days after the expiration of the time during which foreclosure is prohibited."	
101. Preforeclosure referral or filing, § 41	The heading to § 41(f), but not the body of the regulation, refers to a prohibited foreclosure "referral." Section 41(f)(1) prohibits, not a referral, but only a first notice or filing, before day 121 of a delinquency.	We request confirmation that servicers may refer a loan to foreclosure counsel at any time, as long as the first notice or filing is not made impermissibly early. The GSEs often require referral to foreclosure by day 120 of delinquency, and this needs to remain permissible. A referral to foreclosure should not be a "first notice or filing."
102. No foreclosure filing for 120 days needs exceptions, § 41(f)(1), (f)(2), (g) (j), and § 35(b)(9)	If a borrower has vacated or surrendered a property, delaying a foreclosure would increase community blight, a disservice to everyone. Delaying a foreclosure would also unnecessarily impose property maintenance costs on the borrower.	We request clarification that after a borrower vacates or abandons a property, the property should be deemed not the borrower's principal residence within the meaning of § 30(c)(2), so that §§ 39 through 41 do not apply.
103. Appeals of offer or denial, § 41(h)	Section 41(h)(1) provides that borrowers may appeal denied modifications: "[A] servicer shall permit a borrower to appeal the servicer's determination to **deny** a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower." Section 41(h)(2) provides that borrowers have 14 days to appeal an offer: "A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the **offer** of a loss mitigation option	We request clarification that denials of modifications may be appealable, but offers of modifications are not appealable.

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	to the borrower pursuant to paragraph (c)(1)(ii) of this section." Section 41(d) requires denial notices to include information about any appeal available.	
104. Appeals, § 41(h) and comment 41(b)(1)-2	Section 41(h) permits borrowers that submitted their complete applications at least 90 days before a foreclosure sale to appeal denial of "a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower." Comment 41(b)(1)-2 provides: "[I]f a borrower requests that a servicer determine if the borrower is 'prequalified' for a loss mitigation program by evaluating the borrower against preliminary criteria to determine eligibility for a loss mitigation option, the request constitutes a loss mitigation application."	We request clarification that: • A modification is not "available" when the property or loan are not eligible, such as if the property is not owner-occupied when owner-occupancy is required for a modification. • If the prequalification application is for a modification, a denial of the prequalification is not subject to appeal. If a borrower does not prequalify for a modification because, for example, the property is not owner-occupied, that modification is not "available to the borrower" under § 41(h). • A borrower's rejection of a modification offer is not appealable. • Acceptance of a modification offer, followed by a default on the modification, is not a denial subject to appeal.
105. Duplicative loss mitigation requests and the regulation's effective date, § 41(i) and comment 41(i)-1	Section 41(i) provides: "A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account." Comment 41(i)-1 provides: "A transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer."	We support reviewing applications for which loss mitigation is a realistic possibility, but we cannot support permitting loss mitigation applications, with private rights of action, for the purpose of delaying an inevitable foreclosure. We recommend that the CFPB clarify that § 41: • Does not apply retroactively. • Applies to borrowers who have been evaluated for loss mitigation before January 10, 2014 only if: o The borrower has demonstrated a material change in financial circumstances for a loss mitigation option, and The borrower has not been referred to foreclosure by January 10,

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	For borrowers who have been evaluated before January 10, 2014 when the regulation becomes effective, this could be rather disruptive if those borrowers can be evaluated again. It could cause a spike in "new" applications, for which servicers would need to staff up temporarily, which would be operationally disruptive. Additionally, a second evaluation of a borrower who has been denied loss mitigation, or who breached a trial payment plan or a modification agreement, may violate investor requirements.	2014 under investor guidelines that do not require a second evaluation after foreclosure referral. If servicing is transferred after the transferor found a borrower ineligible to submit a new application, the transferee should not be required to accept a new application merely because of the fact of transfer.

SERVICING – REGULATION Z

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Disclosures of Post Consummation Events, § 20		
106. Implementation date for rate reset notices, § 20(c) and (d)	Sections 20(c) and (d) require notices to borrowers based on the number of days until an adjustment will occur. How this will apply to loans for which the adjustment will occur shortly after January 10, 2014 is unclear.	We request clarification that §§ 20(c) and (d) do not require notices for loans that will adjust after January 10, 2014, but for which there is insufficient time to prepare and send the notices after January 10, 2014. Servicers should not need to begin complying with the regulation before it is effective. That is, when a notice is required X days before an adjustment, the notice should not be required if the adjustment occurs fewer than X days after January 21, 2014.
107. Coverage, § 20(c) and (d)	Section 20(c) requires rate reset notices when a rate adjustment results in a payment change. Section 20(c)(2) states when the notices are required for ARM loans. Sections 20(c)(1)(i) and (d)(1)(i) define an ARM loan to include only closed-end loans in which the APR may increase after consummation.	We request clarification whether § 20(c) or (d) notices are required for loans on which the APR may decrease but not increase after consummation.
108. Annual statement removed, § 20(c)	The amendments to § 20(c) remove the existing requirement to send annual statements when a rate adjusts but there is no payment adjustment.	We request clarification that continuing to send such disclosures will remain permissible.
109. Definition of adjustment, § 20(c)(2)	Section 20(c)(2) applies to loans: "[O]riginated prior to January 10, 2015 in which the loan contract requires the adjusted interest rate and payment to be calculated based on the index figure available as of a date that is less than 45 days prior to the **adjustment** date."	We request clarification of whether the two words "adjustment" in bold refer to the rate adjustment date or the payment adjustment date.

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	It also requires disclosures: "[F]or the first **adjustment** to an ARM if it occurs within 60 days of consummation and the new interest rate disclosed at consummation pursuant to § 1026.20(d) was an estimate."	
110. Definition of last payment, § 20(c)(2)(ii) and 20(d)(2)(iii)(C)	Sections 20(c)(2)(ii) and 20(d)(2)(iii)(C) require a disclosure relating to interest-only or negative amortization payments, including how the current and new payments are allocated to principal, interest, and escrow. Both provide: "The current payment allocation disclosed shall be the payment allocation for the last payment prior to the date of the disclosure."	We request clarification of whether the "last payment" refers to the last scheduled payment or the last actual payment.
111. Step increases and trial or permanent modifications, § 20(c)(2)(iii) and (v)	Comment 20(c)-2 provides that rate reset notices are not required in connection with a loan modification, but that: "[S]ubsequent interest rate adjustments resulting in a corresponding payment change occurring pursuant to the modified loan contract, however, are subject to the requirements of § 1026.20(c)." It is common for rate reductions in HAMP permanent modifications to apply for five years, after which the rate can step up by up to one percentage annually until it reaches a cap. Comment 20(c)(1)(ii)-3.iii provides that § 20(c) does not apply to fixed-rate step-rate loans. Similarly, comment 20(d)(1)(ii)-2.iii provides that § 20(d) does not apply to fixed-rate step-rate loans. Section 20(c)(2)(iii) requires a disclosure of how the rate adjustment is determined, including: "(A) The specific index or formula used in making interest rate	We request model language to describe the rate adjustment and new payment after a modification if it is a step adjustment. For a loan that has a trial payment plan before it is modified, and the trial rate is lower than the pre-trial plan rate, is this adjustment "in connection with a modification" even there is no modification yet? If not, we request model language for the required disclosure. For a loan that has a trial payment plan at a reduced rate, but that is not permanently modified for any reason, the rate will revert to the pre-trial plan rate. Is a reset notice required regarding the rate reverting to a pre-trial plan rate although there is no modification? If so, we request model language.

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	adjustments and a source of information about the index or formula; and (B) The type and amount of any adjustment to the index, including any margin and an explanation that the margin is the addition of a certain number of percentage points to the index, and any application of previously foregone interest rate increases from past interest rate adjustments." Section 20(c)(2)(v) requires a disclosure of how the new payment is determined, including: "(A) The index or formula used; (B) Any adjustment to the index or formula, such as the addition of a margin or the application of any previously foregone interest rate increases from past interest rate adjustments . . . ."	
112. Transactions permitting interest rate carryover, §§ 20(c)(2)(iv) and 20(d)(2)(v)	Sections 20(c)(2)(iv) and 20(d)(2)(v) require disclosure of: "Any limits on the interest rate or payment increases at each interest rate adjustment and over the life of the loan, as applicable, including the extent to which such limits result in the creditor, assignee, or servicer foregoing any increase in the interest rate and the earliest date that such foregone interest rate increases may apply to future interest rate adjustments, subject to those limits." Comment 20(c)(2)(iv)-1 provides: "Interest rate carryover, or foregone interest rate increases, is the amount of interest rate increase foregone at any ARM interest rate adjustment that, subject to rate caps, can be added to future interest	We request clarification that rate caps and floors and an indication that the interest rate is rounded are permitted disclosures on ARM notices even when the ARM loan does not provide for interest rate carryover.

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	rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula. The disclosures required by § 1026.20(c)(2)(iv) regarding foregone interest rate increases apply only to transactions permitting interest rate carryover." Comment 20(c)(2)(ii)(A)-1 allows servicers to round the interest rate pursuant to the ARM contract. *See also* 20(d)(2)(iii)(A)-1 Can an interest rate floor adjustment, lifetime cap, and rounding factors be included or described in the ARM disclosures? The commentary implies lifetime caps and interest rate floors are only permitted on the ARM notices for interest rate carryover loans required under § 20(c) and (d). While the commentary indicates that rounding is permissible, there is no indication that such information may be included in the notices.	
113. Payment-option ARM loans, § 20(c)(2)(vi)	Section 20(c)(2)(vi) requires disclosure of: "If applicable, a statement that the new payment will not be allocated to pay loan principal and will not reduce the loan balance. If the new payment will result in negative amortization, a statement that the new payment will not be allocated to pay loan principal and will pay only part of the loan interest, thereby adding to the balance of the loan. If the new payment will result in negative amortization as a result of the interest rate adjustment, the statement shall set forth the payment required to amortize fully the remaining balance at the new interest rate over the remainder of the loan term."	We request clarification of whether the disclosure must include the allocation for the current and new minimum payment amounts; and whether the disclosure must include the allocation for each payment option, and if so, where. Examples of how these disclosures are to be completed would be most helpful.
114. Format, § 20(c)(3)	Section 20(c)(3) requires disclosures in a "format substantially similar	We request clarification of the types of changes that servicers can make

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	to" the model forms.	to the model forms without jeopardizing the safe harbor. For example, for loans that will continue to have a "look back" period of less than 45 days, servicers will need to modify the language regarding the advance notice that will be given prior to payment changes. This should not jeopardize the safe harbor.
115. Timing of initial adjustment notice in a modification, § 20(d)	Section 20(d) provides: "The disclosures shall be provided to consumers at least 210, but no more than 240, days before the first payment at the adjusted level is due. If the first payment at the adjusted level is due within the first 210 days after consummation, the disclosures shall be provided at consummation."	We request confirmation that any initial adjustment notice required in connection with a modified loan, or a loan that has a trial payment plan regardless of whether the loan is permanently modified, may be delivered at the time of the modification (trial or permanent) offer, within 30 days after acceptance of a trial modification period, or within 30 days after execution and return of the modification agreement.
116. Assumptions, § 20(d)	Section 20(d) requires initial rate adjustment between 210 – 240 days before the first payment is due at the adjusted level.	A borrower who assumes a loan assumes all its terms and disclosures. We request clarification that the fact of an assumption does not alter the adjustment notice requirements.
117. Estimated initial rate adjustments, § 20(d)(2)	Initial rate adjustment notices may be required long before the rate adjustment is known.	Examples of how estimates are to be made would be quite helpful. Are disclosures to be based on worst-case assumptions about rate caps? If there is a cap on the first adjustment and a life-of-loan cap, must the servicer use the worst of the two?
118. Initial adjustment in a modification, § 20(d) and comment 20(d)-2	Section 20(d) requires a disclosure "in connection with the initial rate adjustment pursuant to the loan contract." Comment 20(d)-2 provides: "Under § 1026.20(d), the interest rate adjustment disclosures are required only for the initial interest rate adjustment occurring pursuant to the loan contract. Accordingly, creditors, assignees, and servicers need not provide the disclosures for interest rate adjustments occurring in loan modifications made for loss mitigation purposes. The initial interest rate adjustment occurring pursuant to	We request clarification of the following: • The distinction between the "adjustment occurring in [a] loan modification" and the "initial adjustment occurring pursuant to the modified loan contract." • If the first rate adjustment on a loan is the reduction with a trial payment plan, this is not a rate adjustment "pursuant to the loan contract" so that no initial adjustment disclosure is required. • If a rate is lowered for a trial payment plan and is contractually

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	the modified loan contract, however, is subject to the requirements of § 1026.20(d).”	reduced with a permanent modification, this is not a rate adjustment “pursuant to the loan contract” so that no initial adjustment disclosure is required. • If a rate it reduced for a trial payment plan and the loan is not modified for any reason, so that the rate reverts to the pre-trial plan rate, this is not a rate adjustment “pursuant to the loan contract” so that no initial adjustment disclosure is required. • If an ARM loan rate adjusts, the loan is later modified with a second rate adjustment, and the rate later adjusts a third time, to which adjustment does § 20(d) apply?
119. Initial adjustment notice in a fixed-rate step-rate loan, comment 20(d)(1)(ii)-2.iii	Comment 20(d)(1)(ii)-2.iii provides that § 20(d) does not apply to fixed-rate step-rate loans.	We request clarification of whether § 20(d) applies to fixed-rate modified loans on which the rate may step up after a modification.
120.Disclosures of initial rate adjustments in modified loans, § 20(d)(2)(iv) and (vi)	If § 20(d) may apply in connection with trial or permanent loan modifications, how to disclose the initial rate adjustment will need clarity.	If any initial rate adjustment notices are required in connection with trial modifications or permanent modifications, we request model language for § 20(d)(2)(iv) and (vi) disclosures.
121. Modification as an alternative to a rate adjustment, § 20(d)(2)(x)	Section 20(d)(2)(x) requires disclosure of alternatives to a rate adjustment, including: “(C) Modifying the terms of the loan with the creditor, assignee, or servicer; and (D) Arranging payment forbearance with the creditor, assignee, or servicer.”	We recommend that the servicer be permitted to qualify this language so as not to incorrectly cause the consumer to believe these options are available or likely available, for example by adding: “Not all loans qualify for modification or forbearance. You may call us if you would like to learn about these possibilities.”
Prohibited Acts, §36		
122. Applicability to	Section 36(b) [in the LO compensation final rule] provides that § 36(c)	We request clarification of the applicability of § 36(c) to HELOCs.

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HELOCs, § 36(b)	does not apply to HELOCs. Section 36(c)(3), relating to payoff statements, applies to "a consumer credit transaction secured by a consumer's dwelling[.]" The section-by-section analysis to the Regulation Z servicing rule provides: "[T]he Bureau believes it is appropriate to interpret TILA section 129G [payoff statements] to include HELOCs and other open-ended lines of credit secured by a consumer's dwelling in the payoff statement requirement." 78 Fed. Reg. 10902, 10957 (February 14, 2013).	
123. Partial payments, § 36(c)(1)(ii)	Section 36(c)(1)(ii) permits servicers to hold partial payment in suspense until there are sufficient funds to cover a periodic payment. This may not be consistent with an agreement a reinstated borrower makes to pay default fees over time. Servicers and borrowers should have flexibility to work out repayment of default fees. It does not accommodate trial plans, borrowers in bankruptcy whose payment amount has changed, and borrowers in foreclosure.	We request clarification of the following: • If a loan is in a trial plan, during which posting monthly payments is not required, posting payments should not be required. • For reinstated loans, servicers may hold funds in suspense that are greater than a contractual payment, but are intended to pay pending legal or other default fees as agreed until the default fees are paid. • For borrowers in bankruptcy, the payment amount may be greater than the pre-bankruptcy payment amount. In these cases, it should be permissible to hold funds in suspense until there is enough to make the bankruptcy payment amount. • For loans in foreclosure, is should be permissible to hold funds in suspense that are greater than a periodic payment. At this point, the loan is accelerated, so there is no periodic payment.
Periodic Statements, § 41		
124. Inapplicable to HELOCs, § 41(a)(1)	Section 41(a)(1) provides that § 41 applies only to closed-end loans.	We request clarification that this determination is made at origination. If a HELOC later becomes a closed-end loan, servicers may not have

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		the capacity to produce all the periodic statement disclosures, including especially the transaction activity.
125. Definition of billing cycle, § 41(a)(1) and § 2(a)(4)	Section 41(a)(1) requires a periodic statement for each "billing cycle[.]" Comment 41(b)-1 provides that it may be provided "no later than" four days after the close of a courtesy period, although it may be provide earlier. Section 2(a)(4) defines billing cycle as: "[T]he interval between the days or dates of regular periodic statements. These intervals shall be equal and no longer than a quarter of a year. An interval will be considered equal if the number of days in the cycle does not vary more than four days from the regular day or date of the periodic statement." Assume the loan payments are due the 1st of the month and have a 15-day courtesy period. Assume a servicer sends a statement March 15. Assume the borrower then makes the April payment on April 5 and the servicer sends a statement on April 6 reflecting the April 5 payment and all activity since March 16. The April 6 statement also reflects the May payment due. Assume the borrower does not make the May payment until after the courtesy period, and a statement is generated May 17.	We request clarification that it is permissible for the servicer to send statements upon the earlier of receipt of a payment or within four days of a courtesy period, as § 41(a) appears to permit. In this example, the April 6 statement will cover March 16 through April 5 (21 days). The May 17 statement will cover April 6 through May 17 (42 days). Is this permissible even though the amount of time between statements varies by more than four days, because a statement within four days after the courtesy period is the "regular day or date" of the statement?
126. Timing of statement, comment 41(b)-1	Comment 41(b)-1 provides: "Delivering, emailing or placing the periodic statement in the mail within four days of close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt."	We request clarification of the meaning of the word "generally." Are there circumstances when the periodic statement is required before four days after the courtesy period? We request confirmation that the four days are business days and not calendar days. Otherwise, on a three-day weekend, and especially

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		without Saturday mail, there would not be enough time to prepare the statements.
127. Form of statements, § 41(c)	Section 41(c) provides that proper use of the model forms complies with § 41(c).	We request clarification of the types of changes that servicers can make to the model forms without jeopardizing the safe harbor. For example, can servicers provide more detail in the explanation of the amount due (§ 41(d)(2)(i)) to include the monthly amount needed to pay for optional products the borrower requested?
128. Layout of statement, § 41(d)	Section 41(d) requires highly prescriptive layout requirements. This will require costly retooling simply to move information to a different location without any substantive change. The costs are exceptionally high right now because servicers are currently implementing a great many other regulatory amendments. The cost is unreasonable in relation to any consumer benefit.	As long as the periodic statements are clear and conspicuous, servicers should be permitted to alter the layout. In the alternative, we request an extended compliance period for reformatting the periodic statements until servicers' implementation resources are not so overstretched. These would be almost no difference to consumers. We request an additional year.
129. Borrowers in bankruptcy, § 41(d)(2)	The regulation will require servicers to continue to provide periodic statements to borrowers in bankruptcy, while bankruptcy entails an automatic stay and requires collection activities to cease. The CFPB explains: "The Bureau understands that certain laws, such as the FDCPA or the Bankruptcy Code, may prevent attempts to collect a debt from a consumer in bankruptcy, but does not believe these laws prevent a servicer from sending a consumer a statement on the status of their loan. The final rule would allow servicers to make changes to the statement as they believe are necessary when a consumer is in bankruptcy; such servicers may include a message about the bankruptcy and alternatively present the amount due to reflect the payment obligations determined by the individual bankruptcy	Sending periodic statements may not technically violate the bankruptcy laws in some jurisdictions, but is inconsistent with their spirit and intent. In other jurisdictions, the rule may conflict directly with common law. We urge the CFPB not to put servicers at cross purposes to the bankruptcy courts. A simple disclaimer on what otherwise appears to be a debt collection notice may be insufficient to satisfy bankruptcy courts. In trustee "pay-all" jurisdictions, sending the periodic statements may confuse borrowers who must send all mortgage payments through the trustee. Section 41 should use language as in § 39(c) to the effect that nothing in § 41 requires communication with a borrower in a manner prohibited by applicable law.

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	proceeding." 78 Fed. Reg. 10902, 10966 (February 14, 2013) (footnote omitted). Section 39(c), regarding live contact with delinquent borrowers, provides: "Nothing in this section shall require a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law."	Servicers should be able to comply with any bankruptcy court orders. If a bankruptcy court orders a servicer to cease sending periodic statements, servicers should be able to comply with the court's order. We request clarification that when a servicer has a legal opinion or there is common law that sending a periodic statement would be inconsistent with applicable law, that the servicer need not send that periodic statement. The official staff commentary should restate what is in the preamble to ensure that this important clarification is part of the regulation. The preamble states: "The final rule would allow servicers to make changes to the statement as they believe are necessary when a consumer is in bankruptcy; such servicers may include a message about the bankruptcy and alternatively present the amount due to reflect the payment obligations determined by the individual bankruptcy proceeding." 78 Fed. Reg. 10902, 10966 (February 14, 2013). This clarification should also add that servicers may exclude information or not send a statement at all if providing the information or statement is inconsistent with common law or court orders or if the borrower is in Chapter 13 and in a trustee "pay-all" jurisdiction. At a minimum, the CFPB should be explicit that providing a periodic statement to a borrower in bankruptcy *per se* cannot be a UDAAP.
130. Explanation of amount due for delinquent borrowers, § 41(d)(2)	Assume the borrower's monthly payment is $1000. Assume the borrower does not make the March payment within the courtesy period and a statement generated on March 18 reflects a late fee of $50. For the "amount due" on the top of the first page of the March 18th statement, the amount would be $2050 (*i.e.* the March payment and the	The grouping at the top of the form should not be misleading. This one-line disclosure does not accommodate past due amounts, especially when there are more than one, so they should be included only elsewhere.

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	current April payment plus the $50 late fee). The grouping would read: Account number: 12345 Payment Due Date: April 1 Amount Due: $2050.00 If payment is received after 4/15, $50 late fee will be charged. This is misleading about when payments were due, and what is necessary to avoid a late fee: • This indicates that the entire amount is due April 1. However, $1000 of that amount was due on March 1, and $50 was due March 16. • It also indicates that a late fee will be charged if the borrower does not pay $2050. In fact, there would be a late fee only if the borrower does not pay $2000. There is a concern that servicers could be sued under UDAP and UDAAP laws for displaying information in this misleading manner. The H-30(B) model form suggests that the coupon on the statement should reflect $2050. Many servicers list the amount of PITI and late fees on their statement as the total amounts owed by the customer on the loan, but on the coupon list only the contractual amount that is due for the next month to avoid a late fee.	If there are past due amounts, they will need additional explanation. The Explanation of Amount due contains the necessary detail. If the CFPB will continue to require disclosure of the total amount due in addition to past due amounts in the first grouping, we make two recommendations: • Servicers should be permitted flexibility to also disclose that the amount is the total amount due at differing due dates, and that the payment required to avoid a late fee may differ from what is disclosed in this grouping. • Servicers who comply with the regulation should *per se* be deemed not to have committed a UDAP or a UDAAP.
131. Explanation of amount due for borrowers in bankruptcy or foreclosure or after maturity, § 41(d)(2)	Section 41(d)(2) requires disclosure of: "The following items, grouped together in close proximity to each other and located on the first page of the statement: (i) The monthly payment amount, including a breakdown showing	We request guidance on how the disclosure should be prepared. There is no monthly payment amount after acceleration or maturity. There may not be any amount due in a bankruptcy. We request clarification that in disclosing the amount due for Chapter

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	how much, if any, will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed; (ii) The total sum of any fees or charges imposed since the last statement; and (iii) Any payment amount past due." For borrowers in bankruptcy or foreclosure, it is unclear what this disclosure must contain.	13 borrowers under §§ 41(d)(1) and (2), it is permissible to use either: • The amounts due under the bankruptcy plan; or • The post petition amount. Also in disclosing the past payment breakdown under § 41(d)(3), the breakdown would be based on the contractual terms for Chapter 7 cases. For Chapter 13 cases, the servicer must have the flexibility to reflect pre- and post-petition amounts, and any other special payment received pursuant to court requirements.
132. Disclosure of fees, § 41(d)(2)(ii) and (d)(4)	Section 41(d)(2)(ii) requires disclosure of: "The total sum of any fees or charges imposed since the last statement[.]" Section 41(d)(4) requires disclosure of: "A list of all the transaction activity that occurred since the last statement. For purposes of this paragraph (d)(4), *transaction activity* means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list." Comment 41(d)(4)-1.iii provides that the disclosure should include: "The imposition of any fees (for example late fees)[.]"	We request clarification of the extent to which fees may be aggregated, as under § 41(d)(2)(ii) and perhaps comment 41(d)(4)-1.iii, or must be itemized, as under § 41(d)(4). We request clarification that identifying the fee as property preservation is sufficient, and that multiple similar charges may be aggregated. Some fees may need to be entered manually, sl flexibility is helpful. We request clarification that the fees charged since the last statement does not include fees for services rendered but for which the amount is not yet known and for which the account has not yet been charged. We request confirmation that amounts included in the regular monthly payment, *e.g.*, private mortgage insurance that is part of the escrow payment, and optional product payments, need not be separately disclosed as fees or charges on the Transaction Activity required under § 41(d)(4).

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		We request clarification that multiple payments can be combined in showing the amount of a single activity. For example, if the monthly contractual payment is $1000 ($700 interest, $100 principal, and $200 escrow) and the borrower paid $1000 each on March 5 and 10, the next statement could show principal of $200, interest of $1400, and escrow of $400 in the Past Payments Breakdown. In the Transaction Activity section, the same statement would show "3/5/13 Payment Received - Thank You $1000" and "3/10/13 Payment Received – Thank You $1000" so that each payment would not need to be broken down separately.
133. What must be done to apply suspended funds, § 41(d)(5)	Section 41(d)(5) provides that periodic statements disclosures include: "If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, information explaining what must be done for the funds to be applied." This plainly requires disclosure of what the borrower must do to have the funds applied to a full payment. Section 51.18 of the Freddie Mac guide permits applying a payment that is within $50 of the contractual amount, even if it is less than a full payment, by reducing the amount applied to the escrow balance.	We request clarification that a narrative statement (*e.g.* "when a contractual payment is received") or a total dollar amount can be used rather than requiring an actual itemization of how the funds would be applied to principal, interest, and escrow. We request confirmation that if a servicer applies a partial payment that is within $50 of the contractual payment, the servicer may show the shortage amount as part of the amount due, and may show the actual application in the past payment breakdown and transaction activity.
134. Definition of page, § 41(d)(5), (d)(8)	Section 41(d)(5) provides: "The information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter."	We recommend that the reverse side of a piece of paper be deemed a "separate page" for these purposes. We request clarification of the definition of "page" and "first page" in electronic statements. It would be preferable not to define the term and to instead permit the servicer to include all information an any

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	Section (d)(8)has similar language.	reasonable location, consistent with the clear and conspicuous requirements of § 1026.17(a)(1).
135. Delinquency information on a separate page, § 41(d)(8)	Section 41(d)(8) provides that delinquency information may be provided "on a separate page enclosed with the periodic statement or in a separate letter[.]"	We request clarification that such disclosures in a separate letter may be sent before the periodic statement is sent. For example, assume a borrower sends a partial payment on the 5th of the month but the servicer sends periodic statements after the courtesy period. Could this servicer send the partial payment disclosure promptly after receiving the partial payment? As this notice acknowledges receipt of the partial payment and informs the borrower what is necessary for the funds to be applied, this notice may prevent a default, and should be permissible before delivering the periodic statement.
136. Definition of delinquency, § 41(d)(8)	We suggest above, under Regulation X, Exceptions to the definition of loss mitigation option, § 31, some workout arrangements that are technically defaults, but for which the servicer agrees not to pursue its normal collection activities, in exchange for a borrower's agreement to make payments as agreed with the servicer.	These should be exceptions to the definition of delinquency under § 41(d)(8). The requirements for disclosing delinquency information in a periodic statement should be inapplicable, as discussed above.
137. Date of delinquency, § 41(d)(8)(i)	Section 42(d)(8)(i) provides that periodic statements disclosures include the date the consumer became delinquent.	We request clarification of whether this includes or ignores any grace period. If a payment is due on the 1st and there is no late fee until the 16th, what is the date of delinquency?
138. Notification of possible delinquency expenses, § 41(d)(8)(ii)	Section 41(d)(8)(ii) requires delinquency information to include: "A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured[.]"	We request clarification that this requires a general mention of possible expenses rather than a breakdown of individual potential expenses.
139. Amount needed to bring the loan current,	Section 41(d)(8)(vi) requires disclosure of:	We request clarification of whether the "amount needed to bring the account current" is the amount of the next scheduled payment, whether

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§ 41(d)(8)(vi)	"The total payment amount needed to bring the account current[.]" This is not a defined term.	it includes any unpaid late fees for prior late payments, and whether it is synonymous with all amounts due on the loan.
140. Periodic statement exemptions, § 41(e)	Periodic statements are not required for reverse loans, timeshare plans, and when coupon books are permitted. However, they are required while a loan is in a trial payment plan, and after it is accelerated or has matured. The model forms simply are not designed for these situations. The required information includes the monthly payment amount, under § 41(d)(2)(i). • What is the monthly payment amount during a trial payment period? • Disclosing the monthly payment after acceleration could strongly imply that the loan has not been accelerated. There is no monthly periodic payment after acceleration or maturity. Telling borrowers otherwise would be a serious disservice. The required information includes all activity since the last statement, under §41(d)(4). For a defaulted loan, this could amount to reinstatement amounts provided on a monthly basis. The benefits of such a disclosure are outweighed by the costs of producing them. The rule does not address the point in the foreclosure process after which periodic statements are no longer required.	There should be no requirement for periodic statements after a loan is accelerated or has matured because the model form does not accommodate these circumstances. The CFPB should not require periodic statements after a loan is referred to foreclosure. Servicing personnel assigned to a borrower are required to provide all information a borrower requests, so additional disclosures, especially disclosures that could be misleading, should not be required. If the CFPB will require periodic statements after a borrower is referred to foreclosure, we recommend model language and examples. We recommend model language and examples of completed model forms for loans in a trial payment plan. A trial payment period is actually a delinquent loan even if the borrower is making the trial payments. At a minimum, the CFPB should make clear that providing a required periodic statement during a trial payment plan or after acceleration is under no circumstances a UDAP or UDAAP.
141. Coupon books for daily simple interest loans with a fixed rate, § 41(e)(3)	Coupon books, rather than periodic statements, are permissible for fixed-rate loans if a servicer provides certain information.	We request clarification of whether coupon books are permissible for daily simple interest loans that have a fixed rate.
142. Updated coupon		We request clarification of whether coupon books are permissible for

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books for ARM loans§ 41(e)(3)		ARM loans if the servicer updates the coupon book with each payment change, and includes the information specified in § 41(e)(3)
143. Fixed-rate, non-escrowed loans paid by ACH, § 41(e)(3)		We request clarification of whether a servicer may send neither a coupon book nor periodic statements to borrowers who have a fixed-rate, non-escrowed loan that is not 45 days delinquent, and who pay by ACH. These borrowers have agreed to pay by ACH, and the payments do not adjust, so there appears no reason to send periodic statements or coupon books.
144. Small servicer exemption for seller-financed loans, § 41(e)(4)	A consumer may sell a home and provide financing to the buyer. The seller may ask a bank to process regular payments, with an agreement that the bank is responsible solely for collecting regularly scheduled payments and that it has no responsibilities if the loan becomes delinquent.	We request clarification of whether, in this case, assuming the loan is a federally-related mortgage loan, the bank must include this loan in counting the number of loans it services for purposes of the small servicer exemption.
145. Temporarily servicing loans subject to a forward commitment at origination, § 41(e)(4)(ii)(A)	The small servicer exemption applies to servicers that service no more than 5000 loans. Small servicers commonly originate loans, with a commitment at origination to sell the loan and release the servicing, although the secondary market transfer may not take place simultaneously (typically it occurs in 30 days or less).	We request clarification that a loan that the servicer will not service does not count towards the 5000 loan small servicer definition.
146. Definition of small servicer's affiliate, § 41(e)(4)(iii)	The small servicer exemption depends on the number of loans serviced by a servicer and its affiliates.	We request clarification that the § 1026.32(a)(2) definition of affiliate applies for the small servicer exemption in both Regulation X and Regulation Y. This definition provides: "*Affiliate* means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956[.]"

CONSUMER MORTGAGE COALITION

GUIDANCE REQUESTS for MORTGAGE ORIGINATION REGULATIONS to the BUREAU OF CONSUMER FINANCIAL PROTECTION

Working Document
June 3, 2013

HIGHEST PRIORITY

MEDIUM PRIORITY

LOWER PRIORITY

HIGHEST PRIORITY

TOPIC	PROVISION	RECOMMENDATION
Ability to Repay Regulation		
1. Self-employed consumers	Appendix Q § I.D.4.c requires self-employed consumers to provide: "Year to date profit and loss (P&L) statement and balance sheet[.]"	We request clarification that this permits creditors to rely on documents that the consumer or the consumer's company generates, and that audited financial statements are not required.
2. Planned retirement	Comment 43(c)(1)-2 provides: "A change in the consumer's circumstances after consummation (for example, a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense) that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a creditor's compliance with the rule. However, if the application or records considered at or before consummation indicate there will be a change in a consumer's repayment ability after consummation (for example, if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time to part-time employment), the creditor must consider that information under the rule." Appendix Q § I.B.i note I provides: "Effective income for consumers planning to retire during the first three-year period must include the amount of: a. Documented retirement benefits; b. Social Security payments; or c. Other payments expected to be received in retirement.	Comment 43(c)(1)-2 gives the required consideration only for a consumer who states a plan to retire within 12 months, and the appendix gives the required documentation only for consumers who plan to retire in three years. Neither states what is required in other circumstances. Is retirement only relevant if a consumer plans to retire in 12 months or 3 years? If not, what is required in the case of a consumer who states a plan to retire in 4, 5, 10, or 20 years, or who does not have a planned retirement date? How definite must a future possible income reduction be before a creditor must consider it? Do the answers to these questions differ under § 43(c) and appendix Q?
3. Calculation of loan	Loan payment amounts and DTI are calculated differently depending on	Creditors that make an intended QM loan that due to error is not a QM

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payment and DTI	which standard the creditor uses. <u>General repayment ability (non-QM)</u> • For loans with no balloon, IO period, or negative amortization, creditors must calculate the loan payment using the greater of the introductory rate or the fully-indexed rate. § 43(c)(5)(i). • If creditors calculate DTI, they must use the payments on: the covered transaction; simultaneous loans; mortgage-related obligations; and current debt obligations, alimony, and child support. § 43(c)(7). <u>General QM definition</u> • Under the general QM definition, the loan payment is based on the maximum rate during the first five years. § 43(e)(2)(iv)(A). • The required 43 percent DTI is determined using the payments on the covered transaction; simultaneous loans; and mortgage-related obligations. § 43(e)(2)(iv). <u>Special agency QM definition</u> • The agencies also have standards. Fannie Mae, for example, bases loan payment calculations on an ARM loan using the greater of the note rate plus 2% or the fully-indexed rate, but using the note rate if it is fixed for longer than five years. Fannie Mae Selling Guide § B3-6-04. • Fannie Mae bases DTI calculations on monthly payments on installment debts that extend beyond ten months, and sometimes debts that do not extend ten months, plus alimony, child support, or maintenance payments that extend beyond ten months. Fannie Mae Selling Guide § B3-6-02.	loan will try to show compliance with the general repayment ability requirements. To do so, would a creditor need to establish the payment amount, DTI, and residual income calculated under the general repayment ability standards? At a minimum, if the creditor has information that shows a higher payment amount, lower DTI, and higher residual income than required under the non-QM standard, the creditor should be able to use that information to show compliance.

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Points and Fees		
4. Both an affiliate and a nonaffiliate may provide services	Points and fees include 4(c)(7) charges paid to service providers that are affiliated with the creditor, but exclude similar fees paid to a nonaffiliate. § 32(b)(1)(iii).	An affiliate may collect a fee and retain a nonaffiliate to perform a service. For example, a creditor may pay a fee to an affiliated title insurance agent who conducts a title examination, and who also pays part of the fee to an unaffiliated title insurer for insurance. We request confirmation that charges paid to affiliates are limited to amounts the affiliate retains. • This should be the case even if the combined charge is originally paid to the affiliate. • This should be the case regardless of whether the amount is disclosed to the consumer because the points and fees calculation is not required to be disclosed.
5. Financed points and fees and total loan amount	Section 32(b)(4) defines the total loan amount as depending on whether certain points and fees are financed: "The total loan amount for a closed-end credit transaction is calculated by taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii), (iv), or (vi) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor."	If the consumer prepays some but not all closing costs, or some but not all are paid from loan proceeds, how does the creditor determine which fees are financed and which the consumer paid?
6. Treatment of finance charge exclusions	The definition of points and fees includes several items that are defined as finance charge items under §§ 4(a) and 4(b). Points and fees also include additional items, in §§ 32(b)(1)(ii) – (vi) and (b)(2)(ii) – (viii). However, the points and fees definition does not expressly address items excluded from the finance charge definition under § 4(c) – (e).	We request clarification that items excluded from the finance charge under § 4(c) – (e) are not included in points and fees unless they are included in points and fees in §§ 32(b)(1)(ii) – (vi) or (b)(2)(ii) – (viii).
7. Discount points tied to non-LLPA risk factors	The section-by-section analysis for the ability-to-repay rule states: "To the extent that creditors offer consumers the opportunity to pay points to lower the interest rate that the creditor would otherwise	We request clarification that, aside from LLPAs, when a creditor offers a consumer the opportunity pay points to buy down a rate the creditor would otherwise charge to compensate for additional risk factors, the points are *bona fide* discount points if they otherwise satisfy the

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	charge to recover the lost revenue from the LLPAs, such points may, if they satisfy the requirements of § 1026.32(b)(1)(i)(E) or (F), be excluded from points and fees as bona fide discount points." 78 Fed. Reg. at 6408, 6430 (Jan. 30, 2013).	requirements of § 1026.32(b)(1)(i)(E) or (F).
8. Definition of interest rate without any discount points	Section 32(b)(1)(i)(E) and (F) exclude *bona fide* discount points "if the interest rate without any discount does not exceed" specified levels.	We request confirmation that creditors are not required to offer a loan with exactly zero discount points as a prerequisite to excluding discount points from points and fees. We request clarity about identifying the undiscounted rate. A creditor could compensate for risk factors on a loan by charging points, by increasing the rate, or by a combination of the two. A creditor may not offer a rate with exactly zero discount points. For example, a creditor might offer a consumer the following options: • A rate of 4.000% with a credit to the borrower of .25 points; • A rate of 3.875% with the borrower paying .25 points; and • A rate of 3.750% with the borrower paying .75 points. In this example, which rate is the interest rate without any discount?
9. The interest rate compared to the APOR	Section 32(b)(1)(i)(E) and (F) exclude *bona fide* discount points "if the interest rate without any discount does not exceed" specified levels.	We request confirmation that the "interest rate" is the interest rate and not the APR. We request clarification of the interest rate on an ARM loan and step-rate loan.
10. Sufficient rate reduction to exclude discount points	Section 32(b)(3)(i) provides: "The term *bona fide discount point* means an amount equal to 1 percent of the loan amount paid by the consumer that reduces the interest rate or time-price differential applicable to the transaction based on a calculation that is consistent with established industry	On ARM loans, it is a common industry practice for discount points to buy down the introductory rate. We request conformation that discount points that buy down the introductory rate on an ARM loan rather than the rate after recast are "consistent with established industry practices for determining the amount of reduction in the interest rate" within the meaning of § 32(b)(3)(i) and (ii).

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	practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer." Section 32(b)(3)(ii) uses very similar language,	
11. Points and fees paid by an employer	Current § 32(a)(1)(ii) defines points and fees to include amounts "payable by the consumer at or before loan closing[.]" As revised in the HOEPA rulemaking, this provision refers to the points and fees definition in § 32(b)(1) and (2) in the ability-to-repay rule. This definition includes points and fees "known at or before consummation" without regard to who pays them.	Limiting points and fees to those known at or before consummation is helpful because QM, QRM, and HOEPA status must be known before consummation. We suggest points and fees should also be limited to amounts the consumer actually pays. We request clarification that if a creditor pays an amount, or fails to charge it to the consumer, the amount is not included in points and fees. In a corporate relocation loan, an employer may pay points or fees on an employee's mortgage loan. • We request confirmation that employer-paid points and fees are excluded from the finance charge and from points and fees because they are an expense to the employer and a benefit to the consumer. • We request confirmation that if employer-paid points are included in the finance charge, they can be excluded from points and fees as *bona fide* discount points even though they are not directly "paid by the consumer" under § 43(b)(1)(i)(E) and (F), if they meet the applicable requirements. We also request confirmation that amounts paid by a property seller, or by a third party who provides closing cost assistance, are likewise excluded.

TOPIC	PROVISION	RECOMMENDATION
QM Eligibility		
12. Creditor-paid principal curtailments	Section 43(e)(2)(i) provides that a loan qualifies as a QM loan if, among other things, it: "provides for regular periodic payments that are substantially equal, except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage[.]"	Some flexibility is warranted for loans that help consumers pay down the principal. A creditor may offer a loan on which the creditor provides principal curtailments tied to the amount of deposits the consumer has with the creditor. These curtailments reduce the principal balance and shorten the loan term, but do not alter the monthly payment. We request confirmation that this curtailment benefit does not disqualify a loan from QM eligibility.
13. Agency standards unrelated to ability to repay – representations and warrants; jumbo loans	Proposed comment 43(e)(4)-4 provides that a loan that meets the special agency QM definition does not need to meet agency standards unrelated to repayment ability: "However, the creditor need not satisfy standards that are wholly unrelated to assessing a consumer's ability to repay that the creditor is required to perform such as requirements related to selling, securitizing, or delivering already consummated loans and any requirement that the creditor must perform after the consummated loan is sold, guaranteed, or endorsed for insurance such as document custody, quality control, or servicing."	We support this proposal. It can be difficult to separate requirements that address only the consumer's ability to repay from underwriting requirements that include other risk factors. The GSEs and agencies generally require representations and warrants that a loan has been originated in compliance with all applicable law. We request confirmation that such representations and warrants, themselves, are not underwriting requirements, and therefore noncompliance with representations or warrants is irrelevant to QM status. We request confirmation that agency standards related to the amount of loan principal are not related to repayment ability and that loans with a principal amount greater than the agency standards are eligible for the special agency QM definition.
14. Agency standards in written agreements	Proposed comment 43(e)(4)-4.1 provides that a loan can be a QM if: "The loan conforms to the relevant standards set forth in the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single-Family Seller/Servicer Guide in effect at the time, or to standards set forth in a written agreement between the creditor and Fannie Mae or Freddie	We request confirmation that: • If a correspondent lender makes a loan that has a variance from agency standards, that loan is eligible for special agency QM status if the correspondent sells the loan to a creditor who has a written agreement with Fannie Mae or Freddie Mac reflecting that variance. • Errors and defects that fall within an agency's tolerances, or for

TOPIC	PROVISION	RECOMMENDATION
	Mac that permits variation from the standards of those guides[.]”	which there is a written agreement or understanding that the loans will not be subject to repurchase or indemnification demands, are eligible for and retain special agency QM status. • A loan for which a creditor cures errors after consummation, in accordance with GSE and agency standards, retains special agency QM status.
15. Agency standards change after consummation	Proposed comment 43(e)(4)-5 provides: “[E]ach loan should be evaluated by the creditor based on the facts and circumstances relating to the eligibility of that loan at the time of consummation.” The comment gives two examples of DU input errors that are discovered after consummation.	This comment appears to assume that it is possible to know whether the DU recommendation would have changed if accurate information had been input. While DU and LP have processes for re-running loans, they do not always allow for re-running the loan using the same version of DU or LP or the same credit report used to originate the loan. We recommend that the CFPB work with the GSEs to allow creditors to re-run DU and LP with the same AUS version and the same credit report. Barring that, if the credit report or DU or LP has changed, will a DU or LP recommendation be evidence of compliance or noncompliance?
16. Assumptions	Comment 43(a)-1 provides: “In general, § 1026.43 applies to consumer credit transactions secured by a dwelling. . . . In addition, § 1026.43 does not apply to any change to an existing loan that is not treated as a refinancing under § 1026.20(a).” It is unclear whether assumptions are subject to the rule. An assumption involves a change to an “existing loan” but the requirements to provide disclosures on assumptions are in § 20(b), while § 20(a) requires disclosures for refinancings.	We recommend that § 43 not apply to assumptions. If it does, we request confirmation of the following: • If an assumed loan is held in portfolio, it can qualify for QM status under the special agency QM definition. • The rule does not apply to a loan originated before the regulation’s effective date and assumed after that effective date. • If an assumable ARM loan is a QM, the regulation will not apply to a subsequent assumption of that loan. Otherwise: o What is the introductory rate under § 43(c)(5)(i)? o What is the “maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due” in § 43(e)(2)(iv)(A)?
	Residual Income	
17. Need for a residual	The section-by-section analysis states:	Creditors need substantially more certainty before the effective date of

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income test	"[T]he Bureau believes that providing broad standards for the definition and calculation of residual income will help preserve flexibility if creditors wish to develop and refine more nuanced residual income standards in the future. The Bureau accordingly does not find it necessary or appropriate to specify a detailed methodology in the final rule for consideration of residual income." * * * "The Bureau expects to study residual income further in preparation for the five-year review of this rule required by the Dodd-Frank Act." 78 Fed. Reg. at 6487 and 6528 (Jan. 30, 2013).	the regulation on how to define and calculate residual income and what level of residual income is sufficient. We strongly urge the CFPB not to wait years before establishing residual income standards. We instead recommend permitting use of the VA residual income test, at least until the CFPB creates a replacement test.
18. Identifying and quantifying items relevant to residual income, and determining what residual income is sufficient	Comment 43(c)(1)-1.ii.B.*5* provides that evidence that a creditor's ability-to-repay determination was not reasonable or in good faith may include: "The creditor disregarded evidence that the consumer may have insufficient residual income to cover other recurring obligations and expenses, taking into account the consumer's assets other than the property securing the loan, after paying his or her monthly payments for the covered transaction, any simultaneous loans, mortgage-related obligations, and any current debt obligations[.]" In addition, to make non-QM loans under § 43(c), creditors are required to consider either residual income or DTI, but neither is specified. To make higher-priced QM under § 43(e)(1)(ii)(B), creditors must be able to determine:	Both §§ 43(c) and 43(e) use a residual income concept, but the regulation and commentary do not set any standard. Clarity is needed in identifying which items are and are not relevant to residual income, how to quantify the relevant items, whether the household is relevant or only the applicant, and in determining how much residual income is or is not sufficient. Further, it is not clear whether the same standards apply under §§ 43(c) and 43(e). <u>Identifying what is relevant to residual income</u> It is quite unclear what is included in and excluded from residual income. • Under § 43(c), what expenses, other than those enumerated in § 43(c)(2)(i) through (vi), are relevant to residual income? • Does the characterization of these fees as "obligations" in comment 43(c)(1)-1.ii.B.*5* mean to exclude amounts spent on food, clothing, and gasoline because they are largely discretionary? What is the

<table>
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<blockquote>“that the consumer’s income, debt obligations, alimony, child support, and the consumer’s monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.”</blockquote>
The regulation and commentary do not define the terms above in bold. Comment 43(e)(1)(ii)-1 provides:
<blockquote>“For example, a consumer may rebut the presumption with evidence demonstrating that the consumer’s residual income was insufficient to meet living expenses, such as food, clothing, gasoline, and health care, including the payment of recurring medical expenses of which the creditor was aware at the time of consummation . . . .”</blockquote>
</td><td>
comparable standard under § 43(e)?

Under § 43(e)(1)(ii)(B), what are living expenses, and recurring and material non-debt obligations?
Is discretionary spending relevant?
If one borrower pays a recurring child care bill while another borrower does not, is child care a recurring obligation for either borrower?
To what extent are child care expenses, medical costs, food costs, utilities, transportation costs, or federal, state and local income taxes included or excluded?

<u>Quantifying the amounts for residual income items</u>

On what basis is the creditor is to determine the amounts of the relevant residual income items?
Can creditors rely on information provided by the consumer?
What if the consumer does not track the relevant items?
To what extent can creditors rely on average amounts instead of having to obtain customer-specific information?
Do utility bills vary by geography?
Do the relevant costs include actual costs even if part of the actual cost is discretionary?
If a consumer informs a creditor about non-debt obligations or expenses, must the creditor document and verify them?

<u>Consumer or household?</u>
It appears under § 43(c) and 43(e) that residual income is computed solely using the consumer’s information.

Should creditors consider only the information of applicants?
If the transaction is subject to the right to cancel so that an owner

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TOPIC	PROVISION	RECOMMENDATION
		who is not a borrower is defined as a "consumer" under § 2(a)(11), must or may that individual's information also be considered? • Should creditors consider information of other household members who are neither borrowers nor owners? • May creditors consider "income and assets to which the consumer has a reasonable expectation of access" as under the recently finalized Card Act standard, 12 C.F.R. § 1026.51(a)(1)(ii)? <u>What amount of residual income is sufficient?</u> How are creditors and consumers to determine whether residual income is sufficient with neither numerical guidelines nor concrete guidance on the factors that creditors must consider? For each of these questions, an answer is needed under both § 43(c) and § 43(e). Substantially more clarity is needed before the regulation becomes effective.
19. Living expenses	Comment 43(c)(1)-1.ii.B.*5* provides that evidence that a creditor's ability-to-repay determination was not reasonable or in good faith may include: "The creditor disregarded evidence that the consumer may have insufficient residual income to cover other **recurring obligations and expenses**, taking into account the consumer's assets other than the property securing the loan, after paying his or her monthly payments for the covered transaction, any simultaneous loans, mortgage-related obligations, and any current debt obligations[.]"	Do recurring obligations and expenses in comment 43(c)(1)-1.ii.B.*5* differ from necessities in comment 43(c)(1)-1.ii.C?

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	Comment 43(c)(1)-1.ii.C provides: "[A]n ability-to-repay determination may be unreasonable or not in good faith even though the consumer made timely payments for a significant period of time if, for example, the consumer was able to make those payments only by foregoing **necessities** such as food and heat."	
20. Basis for determination	Comment 43(c)(2)-1 provides: "A creditor may, but is not required to, look to guidance issued by entities such as the Federal Housing Administration, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, or Fannie Mae or Freddie Mac while operating under the conservatorship of the Federal Housing Finance Agency."	We request confirmation that reliance on agency and GSE guidance, or on appendix Q, is *per se* compliance with § 43. We also request confirmation that a creditor that relies on the VA residual income standards, even for non-VA loans, cannot later be found to have "disregarded evidence that the consumer may have insufficient residual income" within the meaning of comment 43(c)(1)-1.ii.B.5; and cannot be found to have left the consumer with insufficient residual income or assets with which to meet living expenses andrecurring and material non-debt obligations under § 43(e)(1)(ii)(B).
21. Consistence with ECOA and FCRA	Comment 43(c)(1)-2 provides: "A change in the consumer's circumstances after consummation (for example, a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense) that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a creditor's compliance with the rule. However, if the application or records considered at or before consummation indicate there will be a change in a consumer's repayment ability after consummation (for example, if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time	To the extent that a creditor may need to ask about planned retirements, health care expenses, child care expenses, income and obligations of household members including a spouse, and medical information, the requirements could conflict with ECOA and FCRA requirements. Section 43(c)(2)(vi) requires consideration of a consumer's "child support[.]" Not requiring or permitting a creditor to ask a consumer who is expecting a child about future child support is insufficient to remove the conflict of laws because it does not address whether the information the creditor may not request is relevant to ability-to-repay determinations. We request more guidance about how creditors can request and evaluate information as required or permitted under § 43 without violating either

<table>
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<tr><td></td><td>to part-time employment), the creditor must consider that information under the rule.”

Comment 43(c)(1)-3 provides:

“Section 1026.43(c)(1) does not require or permit the creditor to make inquiries or verifications prohibited by Regulation B, 12 CFR part 1002.”</td><td>ECOA or FCRA.</td></tr>
<tr><td colspan="3">Loan Originator Compensation Regulation</td></tr>
<tr><td>22. Assisting a consumer</td><td>Comment 36(a)-1.i.A.3 provides that a loan originator includes a person who:

“Assist[s] a consumer in obtaining or applying for consumer credit by advising on specific credit terms (including rates, fees, and other costs)[.]”

Section 36(a)(1) defines a loan originator as a person who for compensation:

“[T]akes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities.”

Regulation G § 1007.102 defines a mortgage loan originator as an individual who:</td><td>We request confirmation that a person who provides publicly available loan rates, and who is not thereby a mortgage loan originator under Regulation G, is not thereby also a loan originator under Regulation Z.</td></tr>
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TOPIC	PROVISION	RECOMMENDATION
	"(i) Takes a residential mortgage loan application; and (ii) Offers or negotiates terms of a residential mortgage loan for compensation or gain."	
23. Bonus as proxy	Section 36(d)(1)(iv) permits compensation to a loan originator from a non-deferred profits-based compensation plan that is determined with reference to the profits of the person from mortgage-related business, if, among other things: • The compensation paid to an individual loan originator does not in the aggregate exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which the compensation plan is paid; or • The individual was a loan originator for ten or fewer transactions consummated during the 12-month period preceding the date of the compensation determination.	We request clarification that any such bonus is *per se* not a proxy for loan terms under § 36(d)(1). But if that compensation is a proxy, another question arises about senior executives and attorneys. Many creditors have bonus pools that include nonmortgage profits. A senior executive or attorney who is not a traditional loan originator occasionally steps in to resolve a customer complaint, which may include adjusting fees or rates on a mortgage loan application in process. Creditors do not necessarily track this participation. The senior executive or attorney may receive a bonus after stepping in on more than ten applications in a year, or may receive a bonus of more than ten percent of total compensation for the relevant period. We request confirmation that this tangential activity does not mean the compensation is prohibited. The senior executive or attorney in this case is not in a position to earn more compensation by steering the consumer to a worse loan. At the same time, the tangential assistance could taint an annual bonus, which would be disproportionate to any potential steering.
24. Referral to a loan originator	Comment 36(a)-1.i.A.*1* provides that a loan originator includes a person who: "Refer[s] a consumer to any person who participates in the origination process as a loan originator. Referring includes any oral or written action directed to a consumer that can affirmatively influence the consumer to select a particular loan originator or creditor to obtain an extension of credit when the consumer will pay	We request clarification that a employee of a creditor who need not register as a loan originator under Regulation G is not a loan originator under Regulation Z if that employee refers a consumer to another employee of the creditor. For example, assume that a bank teller is not a loan originator under Regulation G because the teller does not take, or have access to, application information and does not offer loan terms. A teller may be

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	for such credit." Comment 36(a)–4.11.B provides that loan origination does not include persons who: "[P]rovide loan originator or creditor contact information in response to the consumer's request, provided that the employee does not discuss particular credit terms available from a creditor and does not refer the consumer, based on the employee's assessment of the consumer's financial characteristics, to a particular loan originator or creditor seeking to originate particular credit transactions to consumers with those financial characteristics[.]"	aware that a consumer is an existing mortgage customer of the bank. The teller may accept a payment on the mortgage loan, or, when the consumer conducts a transaction with the teller, the bank's system may alert the teller that the consumer has a mortgage with the bank at a rate that is likely higher than the current rate. In these circumstances, the teller may suggest that the consumer speak to the branch's registered loan originator about a possible refinance to a lower rate. If asked, the teller will quote the publically posted rates for refinances. If this conversation results in a closed loan, the teller will receive a small payment. This is an example of cross-selling, not steering. We request confirmation that this activity does not make the teller a loan originator under Regulation Z, thereby triggering the qualification requirements, the restrictions on permissible compensation, and does not result in including the payment in points and fees under § 32(b).
25. EEOC guidance against using credit reports and criminal histories	The EEOC provides guidance that inquiry into a job applicant's credit rating and similar information "generally should be avoided but that "[e]xceptions exist if the employer can show that such information is essential to the particular job in question." The EEOC also discourages employers from using arrest and conviction records as an absolute measure to prevent an individual from being hired except to the extent that it is evident that the applicant cannot be trusted to perform the duties of the position when considering the circumstances.	The impact of the EEOC guidance and prohibitions will vary depending on the definition of loan originator. For that reason, we are unsure of the prioritization of this issue. If every bank teller who cross-sells is a loan originator, the impact could be large. We are not sure the EEOC would take the position that one or a few relatively minor negative items on a credit report should disqualify a person from being a bank teller. Such a position could have a disparate impact on certain classes of job applicants. We therefore urge the CFPB not to define loan originator this broadly. Consultation with the EEOC may be beneficial. We request confirmation that the background checks required by § 36 are "essential to the particular job on question." We request

TOPIC	PROVISION	RECOMMENDATION
		confirmation that when § 36 prohibits employing a person because of a criminal history that this means "it is evident that the applicant cannot be trusted to perform the duties of the position" within the meaning of the EEOC's language.
	HOEPA Regulation	
26. HOEPA APR	The HOEPA regulation defines high-cost mortgages to include loans on which the APR exceeds the APOR by a specified spread. However, the APR used in this definition is not the same APR used for consumer disclosure purposes. Rather, it is: "(i) For a transaction in which the annual percentage rate will not vary during the term of the loan or credit plan, the interest rate in effect as of the date the interest rate for the transaction is set; (ii) For a transaction in which the interest rate may vary during the term of the loan or credit plan in accordance with an index, the interest rate that results from adding the maximum margin permitted at any time during the term of the loan or credit plan to the value of the index rate in effect as of the date the interest rate for the transaction is set, or the introductory interest rate, whichever is greater; and (iii) For a transaction in which the interest rate may or will vary during the term of the loan or credit plan, other than a transaction described in paragraph (a)(3)(ii) of this section, the maximum interest rate that may be imposed during the term of the loan or credit plan."	• For an ARM loan with mortgage insurance, should the mortgage insurance premiums and termination date reflect the same assumptions as are used for the disclosed APR or should they reflect the interest rate assumptions used for the HOEPA APR? • Should per diem interest included in the HOEPA APR calculation reflect the actual charge based on the initial interest rate, or when the fully-indexed rate is higher, should the per diem interest be inflated to reflect that higher fully-indexed rate?
27. Counseling disclosure requirements are needed	In Regulation X, § 1024.20(a)(1) finalized in the HOEPA rule, requires delivery of: "a clear and conspicuous written list of homeownership counseling	Creditors cannot begin to work on the systems requirements for producing this disclosure until the CFBP provides information on its content and format, the required data inputs to obtain information from the CFPB or HUD data, and instructions for how to use the information

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	organizations that provide relevant counseling services in the loan applicant's location." The list must be provided from either: (i) The Web site maintained by the Bureau for lenders to use in complying with the requirements of this section; or (ii) Data made available by the Bureau or HUD for lenders to use in complying with the requirements of this section, provided that the data is used in accordance with instructions provided with the data."	obtained from the CFPB or HUD to create that disclosure. We request that the CFPB provide the necessary information as soon as possible. If it will be delayed, we request additional implementation time. To begin planning the implementation process, it is important to know whether the disclosure will differ for loans that require and do not require counseling.

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Ability to Repay		
28. Relevance of oral information	The section-by-section analysis provides: "[A] consumer may seek to show that a loan does not meet the requirements of a qualified mortgage by relying on information provided orally to the creditor or loan originator to establish that the debt-to-income ratio was miscalculated. Alternatively, a consumer may seek to show that the creditor should have known, based upon facts disclosed orally to the creditor or loan originator, that the consumer had insufficient residual income to be able to afford the mortgage. The final rule does not preclude the use of such oral evidence in ability-to-repay cases." 78 Fed. Reg. 6408, 6512 (January 30, 2013). Comment 43(c)(1)-2 provides: "[I]f the application or records considered at or before consummation indicate there will be a change in a consumer's repayment ability after consummation (for example, if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time to part-time employment), the creditor must consider that information under the rule."	The comment appears to limit the creditor's required consideration to "the application or records[,]" which may be inconsistent with the section-by-section analysis. Or are there some types of orally volunteered information that the creditor must consider but other types of information that only need to be considered if they are written?
29. Credit history, DTI, and residual income	Comment 43(c)(2)(viii)-1 provides: "'Credit history' may include factors such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies. . . . The rule also does not specify which aspects of	• For a non-QM loan, must there be some difference between DTI requirements, residual income requirements, or both, for applicants with good history compared to applicants with poor history to demonstrate that the creditor considered credit history? • Could a creditor's determination to approve a loan to an applicant

	credit history a creditor must consider or how various aspects of credit history should be weighed against each other or against other underwriting factors. Some aspects of a consumer's credit history, whether positive or negative, may not be directly indicative of the consumer's ability to repay. A creditor therefore may give various aspects of a consumer's credit history as much or as little weight as is appropriate to reach a reasonable, good faith determination of ability to repay." Comment 43(c)(7)-3 provides: "The creditor may consider factors in addition to the monthly debt-to-income ratio or residual income in assessing a consumer's repayment ability."	with a good credit score be appropriate if the DTI and/or residual income requirement were less strict, on the basis that credit history shows willingness to repay but not ability to repay? • Is it sufficient to consider credit history in determining whether to make the loan but not the DTI and/or residual income requirements?
30. Relevance of LTV to ability to repay	Comment 43(c)(1)-1.ii.A.*2* provides that evidence that a creditor's ability-to-repay determination was reasonable and in good faith includes: "The creditor used underwriting standards that have historically resulted in comparatively low rates of delinquency and default during adverse economic conditions[.]"	Neither the general ability to repay standard nor the QM standard require a creditor to consider the LTV. Loans with higher LTVs have higher delinquency rates during adverse economic conditions. If a creditor's underwriting standards do not treat high-LTV loans in a more conservative manner than low-LTV loans, is this evidence that the creditor's determination of ability to repay was not reasonable and in good faith?
31. Community lending exemption	Section 43(a)(12) defines simultaneous loan as: "another covered transaction or home equity line of credit subject to § 1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction or, if to be made after consummation, will cover closing costs of the first covered transaction."	The May 2013 ability-to-repay amendments provide an exemption from the ability to repay requirement for certain creditors who typically make subordinate loans or forgivable grants for closing costs and down payment assistance. We request confirmation that the subordinate lien or forgivable grant would not be a "covered transaction" or a "simultaneous loan" that the senior creditor must consider for ability-to-repay purposes. • Otherwise, we request guidance on how the senior creditor should consider this simultaneous loan. The creditor may not be able to accurately determine the payment amount on these loans.

		• If the subordinate lien or forgivable grant is not a simultaneous loan, it is not clear how the senior creditor could verify the exemption. We suggest that the CFPB or HUD provide a website listing exempt entities. • We request guidance on how to verify the status of non-profits and whether they meet the requirements of the exemption.
Affiliate Fees		
32. Exemptions from points and fees		We request confirmation that points and fees do not include items paid to a creditor's affiliate that are none of the following: • Finance charge items under § 4(a) or (b); • Section 4(c)(7) charges; • Insurance items listed in §§ 32(b)(1)(iv) or (b)(2(iv).
33. Creditor-paid affiliate fees	Comment 32(b)(1)(i)-1 provides: "In general, a charge or fee is 'known at or before consummation' if the creditor knows at or before consummation that the charge or fee will be imposed in connection with the transaction, even if the charge or fee is scheduled to be paid after consummation."	We request confirmation that if a creditor, rather than the consumer, pays a charge to an affiliate, the charge is not included in points and fees because it is not "imposed in connection with the transaction."
QM Eligibility		
34. Payments from a subsidy account	Section 34(e)(2)(i) requires QM loans generally to have "regular periodic payments that are substantially equal[.]"	A loan may have substantially equal monthly payments, and a subsidy account, from which a contribution is made to the monthly loan payments for an initial period of time. We request clarification that these loans are eligible to be QM loans, regardless of whether the borrower or the borrower's employer funds the subsidy account.
35. Loan term for balloon and IO loans	Section 43(b)(6) defines the loan term as the period of time to repay the obligation in full. Comment 43(b)(6)-1 gives an example: "For example, a loan with an initial discounted rate that is fixed for the first two years, and that adjusts periodically for the next 28 years	For balloon and interest-only loans, is the loan term the "amortization period on which the periodic amortizing payments are based" or the "period of time to pay the obligation in full"?

	has a loan term of 30 years, which is the amortization period on which the periodic amortizing payments are based."	
36. Agency standards unrelated to ability to repay	Proposed comment 43(e)(4)-4 provides that a loan can maintain QM status under the special agency QM definition if: "the creditor [does] not satisfy standards that are wholly unrelated to assessing a consumer's ability to repay that the creditor is required to perform such as requirements related to selling, securitizing, or delivering already consummated loans and any requirement that the creditor must perform after the consummated loan is sold, guaranteed, or endorsed for insurance such as document custody, quality control, or servicing."	In some cases, it may be difficult to separate requirements that address only the consumer's ability to repay from underwriting requirements that include other risk factors. Meeting post-consummation requirements sometimes depends upon third parties, and a failure of third parties to meet these requirements should not cause the loss of QM status. For example, in escrow states, Fannie Mae requires a final HUD-1 signed by the settlement agent, but the creditor cannot ensure that the settlement agent provides it. Other examples include collecting follow-up documentation such as recording documents and work completion escrow documents. QM status needs to be known before consummation, so post-consummation requirements should be irrelevant to QM status. We request confirmation that failure to meet post-consummation requirements does not cause a loss of QM status, regardless of who caused the failure.
37. GSE written waivers	Proposed comment 43(e)(4)-4.i provides that a loan can maintain QM status under the special agency rule if it meets: "[S]tandards set forth in a written agreement between the creditor and Fannie Mae or Freddie Mac that permits variation from the standards of [the GSE selling] guides[.]"	We request confirmation that a GSE's written waiver of a requirement on an individual loan or group of loans would allow the loans or loans to retain QM status.
Fair Lending		
38. Ability-to-repay and disparate impact		Will the CFPB, DOJ, or HUD bring disparate impact cases if creditors make only QM loans? If a creditor has a policy of making only QM loans but one or some loans are later deemed to be non-QM because of ambiguities in appendix Q, will that creditor be more susceptible to disparate impact liability? Guidance on how to reconcile the conflicting policy goals of ability-to-

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<tr><td colspan="3">Record Retention</td></tr>
<tr><td>39. Record retention</td><td>Section 25(a) (in the QM rule) and 25(c)(2) (in the loan originator compensation rule) require:
• Creditors to retain evidence of compliance with Regulation Z for two years; and
• Creditors to “records sufficient to evidence all compensation” it pays to loan originators for three years.
• Loan originator organizations to retain “records sufficient to evidence all compensation” it receives, or that it pays to an individual loan originator, for three years.</td><td>We request confirmation that this does not require each consumer mortgage creditor nationwide to retain records showing every GSE standard applicable to each loan, every DU and LP amendment, and all information input into DU or LP for every QM loan.
We also request confirmation that it does not require retaining all information showing how interest rate reductions for discount points were determined.</td></tr>
<tr><td colspan="3">Loan Originator Compensation and Qualification</td></tr>
<tr><td>40. Employees who change jobs but not employers</td><td>Comment 36(f)(3)(i)-3 provides:

“Section 1026.36(f)(3)(i) does not require the loan originator organization to obtain the covered information for an individual whom the loan originator organization hired as a loan originator on or before January 10, 2014, and screened under applicable statutory or regulatory background standards in effect at the time of hire. However, if the individual subsequently ceases to be employed as a loan originator by that loan originator organization, and later resumes employment as a loan originator by that loan originator organization (or any other loan originator organization), the loan originator organization is subject to the requirements of § 1026.36(f)(3)(i).”</td><td>We request confirmation that this exemption also applies for an employee who ceases to be a loan originator but remains with the same employer, then returns to a loan originator position still with the same employer.</td></tr>
</table>

LOWER PRIORITY

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Points and Fees		
41. Hazard and credit property insurance	Section 32(b)(1)(i) includes in points and fees certain finance charge items. The finance charge definition excludes "any charge of a type payable in a comparable transaction." § 4(a). Hazard is a type of charge payable in a cash purchase, and should not be in points and fees. Section 32(b)(1)(iv) includes in points and fees (emphasis added): "**Premiums** or other charges payable at or before consummation **for any** credit life, credit disability, credit unemployment, or credit property insurance, or any other life, **accident**, health, or loss-of-income **insurance** for which the creditor is a beneficiary, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract[.]" Comment 32(b)(1)(iv) explains that credit property insurance does not include homeowners' insurance because homeowners' insurance covers the consumer's property interest. It also explains that accident insurance premiums are included on points and fees only if the consumer is not a beneficiary: "2. *Credit property insurance.* Credit property insurance includes insurance against loss of or damage to personal property, such as a houseboat or manufactured home. Credit property insurance covers the creditor's security interest in the property. Credit property insurance does not include homeowners' insurance, which, unlike	We request that the comment explicitly exclude from points and fees homeowner's insurance premiums paid at or before closing. This insurance covers the dwelling attached to real property, including a condominium or cooperative unit, and insures the borrower's interest, subject to the mortgage. Comment 32(b)(1)(iv) addresses these insurance premiums only indirectly. Consumers purchase homeowner's insurance in a comparable cash transaction so the premiums are excluded by § 4(a), yet are included in points and fees under comment 32(b)(1)(iv). Comment 32(b)(1)(iv) states that credit property insurance differs from homeowner's insurance, but does not make the distinction clear. Is the distinction that credit property insurance insures only the creditor's security interest, while hazard insurance insures the consumer, subject to the mortgage? If so, we request confirmation that the premiums paid at or before closing for required hazard and flood insurance to a nonaffiliate are not included in points and fees if the consumer is the insured and there is a loss payable mortgagee clause. Is credit property insurance limited to insurance on personal property such that any insurance on a real property dwelling is hazard insurance, and therefore not included in points and fees as long as it is excluded from the finance charge? Is credit property insurance in §§ 32(b)(1)(iv) and 32(b)(2)(iv) defined

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	credit property insurance, typically covers not only the dwelling but its contents and protects the consumer's interest in the property. 3. *Life, accident, health, or loss-of-income insurance.* Premiums or other charges for these types of insurance are included in points and fees only if the creditor is a beneficiary. If the consumer or another person designated by the consumer is the sole beneficiary, then the premiums or other charges are not included in points and fees."	the same way as in § 36(i)(2)(i) (which prohibits financing single premium credit insurance)? It is not always clear under state law whether a cooperative is real or personal property. Is insurance required on a cooperative credit property insurance or hazard insurance? Is flood insurance credit property insurance or hazard insurance?
Ability to Repay		
42. Underwriting standards based on empirical information	Comment 43(c)(1)-1.i is intended to permit creditors to select and amend their underwriting requirements: "Section 1026.43(c) and the accompanying commentary describe certain requirements for making this ability-to-repay determination, but do not provide comprehensive underwriting standards to which creditors must adhere. For example, the rule and commentary do not specify how much income is needed to support a particular level of debt or how credit history should be weighed against other factors. So long as creditors consider the factors set forth in § 1026.43(c)(2) according to the requirements of § 1026.43(c), creditors are permitted to develop their own underwriting standards and make changes to those standards over time in response to empirical information and changing economic and other conditions."	Underwriting is in part a matter of judgment. There is a large body of underwriting studies, the extent to which they are empirical is debatable, and they often conflict. This comment could result in litigation over which empirical information a creditor should have used, which would be just as subjective as having no "empirical" standard at all. We suggest removing the phrase "empirical information and" from the last sentence quoted.
43. Comparatively low rates of delinquency and default	Comment 43(c)(1)-1.ii.A.*2* provides that evidence that a creditor's ability-to-repay determination was reasonable and in good faith includes: "The creditor used underwriting standards that have historically resulted in comparatively low rates of delinquency and default	We request a definition of the term "comparatively low[.]" The comparison will vary greatly depending on which types of loans are compared, so additional guidance is needed on how to make the comparison. All delinquencies are defaults, but not all defaults are delinquencies.

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	during adverse economic conditions[.]"	Nonpayment defaults are irrelevant to ability to repay. The regulation should not apply to, or consider, defaults other than delinquencies. The same clarification is needed in comment 43(c)(1)-1.ii.B.*1*.
44. Reliance on consumer statements	Comment 43(c)(1)-1.i provides: "A consumer's statement or attestation that the consumer has the ability to repay the loan is not indicative of whether the creditor's determination was reasonable and in good faith."	We request clarification that a statement by a consumer that the information in a loan application or in another specified document is complete, accurate, and not misleading demonstrates the information about which the creditor was aware at closing, unless the consumer provides credible contrary evidence.
45. Evidence that an ability-to-repay determination was not reasonable or in good faith	Comment 43(c)(1)-1.ii.B.*1* provides that evidence that a creditor's ability-to-repay determination was not reasonable or in good faith may include: "The consumer defaulted on the loan a short time after consummation or, for an adjustable-rate, interest-only, or negative amortization mortgage, a short time after recast[.]"	A showing of inability to repay should require proof that, based on information on which the creditor reasonably relied, including information the consumer provided to the creditor, the creditor's determination was faulty. We recommend the following clarifications: • If a payment default was reasonably unforeseeable at or before consummation, that payment default should be *per se* irrelevant. • If a consumer directly or indirectly provided inaccurate information to a creditor who reasonably relied on it, the fact that it was inaccurate should be *per se* irrelevant to the question whether the creditor's ability-to-repay determination was proper.
46. Length of timely payments as an indicator of ability to repay	Comment 43(e)(1)(ii)-1 provides: "In addition, the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income and prove that, at the time the loan was made, the creditor failed to make a reasonable and good faith determination that the consumer had the reasonable ability to repay	This will encourage consumers of QM loans outside the safe harbor to strategically make at least one late payment early after consummation to preserve the ability to rebut the presumption. This comment appears to assume that the payment increases after recast, and that the payments before recast are irrelevant. Some ARM loans with a long introductory period have an initial rate that is higher than the fully-indexed rate. We recommend clarification that rebutting the presumption requires

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	the loan."	showing *inability* to repay, and that mere nonpayment should be *per se* irrelevant. We recommend clarification that a strategic default is *per se* irrelevant. We recommend that timely payments on an ARM loan before recast should be evidence of ability to repay, even if the payment will increase after recast. That the payment will increase at recast is relevant, but so are a payment decrease after recast, and a pattern of making timely payments.
47. Verification of property taxes with government-provided information	Comment 43(c)(3)-5 provides: "With respect to the verification of mortgage-related obligations that are property taxes required to be considered under § 1026.43(c)(2)(v), a record is reasonably reliable if the information in the record was provided by a governmental organization, such as a taxing authority or local government. The creditor complies with § 1026.43(c)(2)(v) by relying on property taxes referenced in the title report if the source of the property tax information was a local taxing authority."	We request clarification that the phrase "provided by a governmental organization" means directly or indirectly provided by a governmental organization, such as in the title report example, but also in other cases, such as when a service provider obtains the information and provides it to a creditor.
48. Debt or liability specified in appendix Q	Comment 43(e)(2)(v)-3 provides: "Section 1026.43(e)(2)(v)(B) requires creditors to consider and verify the consumer's current debt obligations, alimony, and child support. For purposes of this requirement, the creditor must consider and verify, at a minimum, any debt or liability specified in appendix Q. A creditor may also consider and verify other debt in accordance with § 1026.43(c)(2)(vi) and (c)(3); however, such debt would not be included in the total monthly debt-to-income ratio determination required by § 1026.43(e)(2)(vi)."	We request clarification of the term "any debt or liability specified in appendix Q." Appendix Q uses the terms liabilities, recurring obligations, other continuing obligations, and contingent liabilities. Is each of these a "current debt obligation" within the meaning of § 43(e)(2)(v)-3? Or are these appendix Q terms limited to current debt obligations?

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49. DTI calculation in § 43(e)(2)(vi) and appendix Q	Under § 43(e)(2)(vi), QM loans must have a DTI not exceeding 43 percent. Section 43(e)(2)(vi) provides: "For purposes of this paragraph (e)(2)(vi), the ratio of the consumer's total monthly debt to total monthly income is determined: (A) Except as provided in paragraph (e)(2)(vi)(B) of this section, in accordance with the standards in appendix Q; (B) Using the consumer's monthly payment on: (*1*) The covered transaction, including the monthly payment for mortgage-related obligations, in accordance with paragraph (e)(2)(iv) of this section; and (*2*) Any simultaneous loan that the creditor knows or has reason to know will be made, in accordance with paragraphs (c)(2)(iv) and (c)(6) of this section." Comment 43(e)(2)(vi) provides: "As provided in appendix Q, for purposes of § 1026.43(e)(2)(vi), creditors must include in the definition of 'debt' a consumer's monthly housing expense. This includes, for example, the consumer's monthly payment on the covered transaction (including mortgage-related obligations) and on simultaneous loans. Accordingly, § 1026.43(e)(2)(vi)(B) provides the method by which a creditor calculates the consumer's monthly payment on the covered transaction and on any simultaneous loan that the creditor knows or has reason to know will be made."	We request clarification of the specific provisions within appendix Q to which § 43(e)(2)(vi)(A) refers. We request clarification that the comment language means: "~~As provided in appendix Q, f~~**F**or purposes of § 1026.43(e)(2)(vi), creditors must include in the definition of 'debt' a consumer's monthly housing expense. This **housing expense** includes~~, for example,~~ **only** the consumer's monthly payment on the covered transaction (including mortgage-related obligations) and on simultaneous loans."
50. Contingent liabilities	Comment 43(c)(2)(vi)-2 provides:	We request clarification of whether the potential liability of an applicant for a non-QM loan as a surety or guarantor under a different

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	"If one consumer [of multiple applicants] is merely a surety or guarantor, § 1026.43(c)(2)(vi) does not require a creditor to consider the debt obligations of such surety or guarantor." Comment 43(c)(2)(viii)-2 provides: "When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, § 1026.43(c)(2)(viii) requires a creditor to consider the credit history of all such joint applicants. If a consumer is merely a surety or guarantor, § 1026.43(c)(2)(viii) does not require a creditor to consider the credit history of such surety or guarantor."	loan should be included in the applicant's debt obligations.
51. Verification of simultaneous loan by promissory note	Comment 43(c)(3)-4 provides: "If the creditor knows or has reason to know that there will be a simultaneous loan extended at or before consummation, the creditor may verify the simultaneous loan by obtaining third-party verification from the third-party creditor of the simultaneous loan. For example, the creditor may obtain a copy of the promissory note or other written verification from the third-party creditor. For further guidance, see comments 43(c)(3)–1 and –2 discussing verification using third-party records." The referenced comments do not relate to simultaneous loans. The relevant portions provide: "Records a creditor uses for verification under § 1026.43(c)(3) and (4) must be specific to the individual consumer. . . . A creditor also may obtain third-party records directly from the consumer, likewise	The suggestion that a creditor verify a loan that has not closed by obtaining the promissory note is unclear because the note will not exist. The creditor of an intended simultaneous loan may not provide verification for any reason, including that the existence and terms of the loan are not yet certain. We request clarification that when a third-party creditor of a simultaneous loan does not provide verification, the creditor may rely instead on a borrower's statement about the fact of, and the terms of, any simultaneous loan. If available from the consumer, the creditor should be able to rely on a copy of the application for the simultaneous loan.

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	as long as the records are reasonably reliable and specific to the individual consumer."	
52. Water bills should be excluded from mortgage-related obligations	Comment 43(b)(8)-2 includes property taxes, defined broadly, in mortgage-related obligations: "Section 1026.43(b)(8) includes obligations that are equivalent to property taxes, even if such obligations are not denominated as 'taxes.' For example, governments may establish or allow independent districts with the authority to impose levies on properties within the district to fund a special purpose, such as a local development bond district, water district, or other public purpose. These levies may be referred to as taxes, assessments, surcharges, or by some other name. For purposes of § 1026.43(b)(8), these are property taxes and are included in the determination of mortgage-related obligations."	Certain services, such as water, sewer or trash services may be provided by either a private company or a government. Where a government imposes charges for such services, the charges should be explicitly excluded from mortgage-related obligations because they have no relation to the mortgage loan.
53. Roommate or boarder	As it would be amended by the CFPB's April 19, 2013 proposed rulmaking, appendix Q § II.D.3 would read: "a. Income from roommates in a single family property occupied as the consumer's primary residence is not acceptable. Rental income from boarders however, is acceptable. b. The rental income may be considered effective, if shown on the consumer's tax return. If not on the tax return, rental income paid by the boarder may not be used in qualifying."	We recommend defining the terms roommate and boarder so that the differences between the terms are known.
Refinance of Nonstandard Loan		
54. Use of proceeds of standard mortgage	Section 43(d)(1)(ii)(E) provides that proceeds of a standard mortgage may be used only to pay off the nonstandard loan and to pay closing costs required to be disclosed under RESPA. Comment 43(d)(1)(ii)(E)-1 provides:	We suggest the proceeds also be able to be used to pay for a payoff statement and a lien release on the nonstandard loan, and, for a shared appreciation nonstandard loan, an appraisal to determine the payoff amount. These would be consistent with the intent of the regulation and

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	"If the proceeds of a covered transaction are used for other purposes, such as to pay off other liens or to provide additional cash to the consumer for discretionary spending, the transaction does not meet the definition of a 'standard mortgage.'"	comment.
55. Thirty days as "generally" a reasonable amount of time	Under § 43(d)(5)(i)(A), in calculating the payment on a nonstandard mortgage, creditors may use the fully-indexed rate as of a reasonable of time before or after the creditor receives the application. Comment 43(d)(5)(i)-2 provides: "Thirty days is **generally** considered 'a reasonable period of time'" (emphasis added).	We recommend removing the word "generally" because it creates substantial uncertainty for no apparent reason. If the word remains, we request clarification of all circumstances under which thirty days would not be a reasonable amount of time. When thirty days is not a reasonable amount of time, we request clarification of how the creditor is to know what is reasonable. Refinancing nonstandard loans that the borrowers can afford into standard loans with materially lower payments are a clear borrower benefit and do not raise ability-to-repay concerns. There should be as few restrictions on this consumer benefit as is reasonably possible.
56. Payment calculation for nonstandard loan – relevance of actual prepayments	In calculating the payment on a nonstandard loan under § 43(d)(5)(i), it is not clear whether the creditor must take into account any actual prepayments on the nonstandard loan. For IO loans, § 43(d)(5)(i)(C)(*2*) directs the creditor to base the calculation of the payment on a nonstandard loan on: "[T]he outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date[.]" Comment 43(d)(5)(i)-6 provides:	We request clarification of the calculation for a nonstandard loan on which the consumer has made optional prepayments before recast.

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	"First, the payment must be based on the outstanding principal balance as of the date of the recast, assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For a loan on which only interest and no principal has been paid, the outstanding principal balance at the time of recast will be the loan amount, as defined in § 1026.43(b)(5), assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For example, assume that a mortgage has a 30-year loan term, and provides that the first 24 months of payments are interest-only. If the 24th payment is due on September 1, 2015, the creditor must calculate the outstanding principal balance as of September 1, 2015, assuming that all 24 payments under the interest-only payment terms have been made and credited timely and that no payments of principal have been made." Even if all scheduled payments are made, it is possible that the borrower made some optional prepayments. The example in this comment assumes the consumer has made no principal payments, and the example in comment 43(d)(5)(i)-7 also assumes the consumer has made no principal payments. The explanation of the issue concerns an IO loan, but the same question arises for actual prepayments on a nonstandard ARM loan. For negative amortization loan, comment 43(d)(5)(i)-8.i provides: "If the consumer makes payments above the minimum periodic payments for the maximum possible time, the creditor must calculate the maximum loan amount based on the outstanding principal	

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	balance." It is unclear why this example is limited to a consumer who makes payments above the minimum requirement "for the maximum possible time" as opposed to a shorter period. Is this the only circumstance in which the creditor must consider the actual outstanding principal balance?	
	Loan Originator Compensation and Qualification	
57. Revising compensation plans	Comment 36(d)(1)-6 (in the loan originator compensation rule) provides: "Section 1026.36 does not limit a creditor or other person from periodically revising the compensation it agrees to pay a loan originator. However, the revised compensation arrangement must result in payments to the loan originator that are not based on the terms of a credit transaction. A creditor or other person might periodically review factors such as loan performance, transaction volume, as well as current market conditions for originator compensation, and prospectively revise the compensation it agrees to pay to a loan originator."	How often can compensation change, and can it change in response to loan production?
58. Long term loan performance	Comment 36(d)(1)-2.i.B permits compensation based on the long-term performance of an originator's loans.	What is the definition of long-term performance? If a loan originator will receive a payment each month after origination that the loan is not delinquent, would all such payments be considered payments for long-term loan performance?
	Appendix Q	
59. Applicability	Appendix Q is entitled *Appendix Q to Part 1026—Standards for Determining Monthly Debt and Income.*	We request confirmation that appendix Q applies only to § 43(e)(2)(v) and (vi), and that it does not apply to debt and income determinations under § 43(c).

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60. Verification of part-time employment	Appendix Q § I.A.3.a.iv provides that creditors must examine the "employer's confirmation of continued employment." Section I.B.4.a provides: "Part-time and seasonal income can be used to qualify the consumer if the creditor documents that the consumer has worked the part-time job uninterrupted for the past two years, and plans to continue. Many low and moderate income families rely on part-time and seasonal income for day to day needs, and creditors should not restrict consideration of such income when qualifying these consumers."	We request clarification that if an application lists part-time employment and if the verification of employment has no evidence that employment is not going to continue, that the creditor has adequately documented that the income will continue.
61. Conclusive evidence of no debt collection	Appendix Q § IV.2 provides: "The contingent liability policies described in this topic apply unless the consumer can provide conclusive evidence from the debt holder that there is no possibility that the debt holder will pursue debt collection against him/her should the other party default."	We request confirmation that copies of cancelled checks that the debt holder cashed are sufficient, even if they are not obtained from the debt holder.
62. Income reasonably expected to continue	The CFPB proposes to remove language from § I.B.1.a about income reasonably expected to continue "through at least the first three years of the mortgage loan."	We request clarification of how far into the future creditors must reasonably expect income to continue.
63. Cost of tax transcripts	The CFPB has proposed to remove two statements, in §§ I.B.7 note iii and I.C, that the cost of the transcript may be charged to the consumer.	We request clarification that that this change does not prohibit the creditor from charging the consumer for the transcript if otherwise permitted by law.
Other		
64. Definition of "offer" for alternative offer	Section 43(g)(3) provides: "A creditor must not offer a consumer a covered transaction with a prepayment penalty unless the creditor also offers the consumer an alternative covered transaction without a prepayment penalty . . . ."	When a loan is offered is not clear. We suggest clarification that a creditor may comply by documenting that the creditor made the consumer aware of the alternative covered transaction.
65. Fully-indexed rate for	Comment 43(c)(5)(i)-5.iii describes a "fully-indexed rate" for a step-rate	We recommend clarification that step-rate loans do not have a fully-

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step-rate loans	loan: "A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the interest rate will be 6.5 percent for the first two years of the loan, 7 percent for the next three years of the loan, and 7.5 percent thereafter. Accordingly, the scheduled payment amounts are $1,264 for the first two years, $1,328 for the next three years, and $1,388 thereafter for the remainder of the term. For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,398, which is the substantially equal, monthly, fully amortizing payment that would repay $200,000 over 30 years using the fully indexed rate of 7.5 percent." Section 43(b)(3) defines a fully-indexed rate as a rate that applies after recast, and recast is not defined for step-rate loans.	indexed rate, and that their payment calculation under § 43(c)(5)(i) uses the maximum rate that may apply during the loan term. Otherwise, § 43(c)(5)(i)(A) would appear to use the introductory rate on a step-rate loan, which was not the intent.
66. Nonjudicial foreclosure	Section 36(h) provides: "A contract or other agreement for a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction."	We request confirmation that this does not prohibit nonjudicial foreclosure in the event of any default.
67. FHA or Regulation Z definition of loan amount	Section 32(b)(1)(i)(C)(2) includes upfront PMI premiums in points and fees only if the premiums exceed an FHA premium amount: "If the premium or other charge is payable at or before consummation, [points and fees exclude] the portion of any such	When calculating what portion of a non-FHA upfront MIP is included in points and fees in Regulation Z, we request clarification and examples of how to calculate the loan amount, and whether it varies based on whether the borrower finances the upfront MIP.

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	premium or other charge that is not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)), provided that the premium or charge is required to be refundable on a pro rata basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan[.]" FHA upfront premiums are calculated as a percentage of the "base loan amount" without the premium even if the borrower finances it. FHA Mortgagee Letter 2012-4 provides: "FHA will continue to permit financing of this [upfront MIP] charge into the mortgage and will continue to calculate actual premium charges against the base loan amount before adding any financed UFMIP." Section 32(b)(4)(i) defines the total loan amount as: "The total loan amount for a closed-end credit transaction is calculated by taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii) [4(c)(7) fees], (iv) [credit insurance, etc] or (vi) [prepayment penalties] that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor." The referenced § 18(b) defines "amount financed" to include the principal loan amount:	The borrower may not decide whether to finance an MIP or pay it at closing until late in the origination process. Creditors need to know the amount of points and fees as early as possible. For this reason, we recommend that the amount included in points and fees may be calculated as if the consumer will finance the amount, even if the consumer later decides not to do so. [We have reached out to the mortgage insurance industry for a recommendation on how to resolve this question. We will update this document when we receive feedback.]

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	"The amount financed is calculated by: (1) Determining the principal loan amount or the cash price (subtracting any downpayment); (2) Adding any other amounts that are financed by the creditor and are not part of the finance charge; and (3) Subtracting any prepaid finance charge." This definition deducts amounts financed only if they are not part of the finance charge. MIPs are part of the finance charge, § 4(b)(5), meaning that, under § 32(b)(4)(i), MIPs are included in the amount financed if the borrower finances them. Section 43(b)(5) defines loan amount as: "*Loan amount* means the principal amount the consumer will borrow as reflected in the promissory note or loan contract." If a borrower finances a finance charge item, such as an upfront MIP, it may or may not be included in the promissory note. *See* comment 18(b)(3).	
68. Typographical error	Comment 43(c)(5)(i)-5.iii gives an example of the same payment amount on a loan, once as $1388 and once as $1398. Both should be $1398.	